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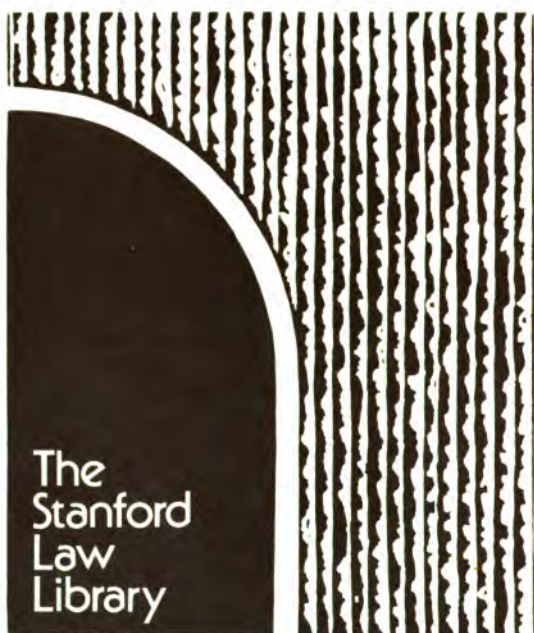
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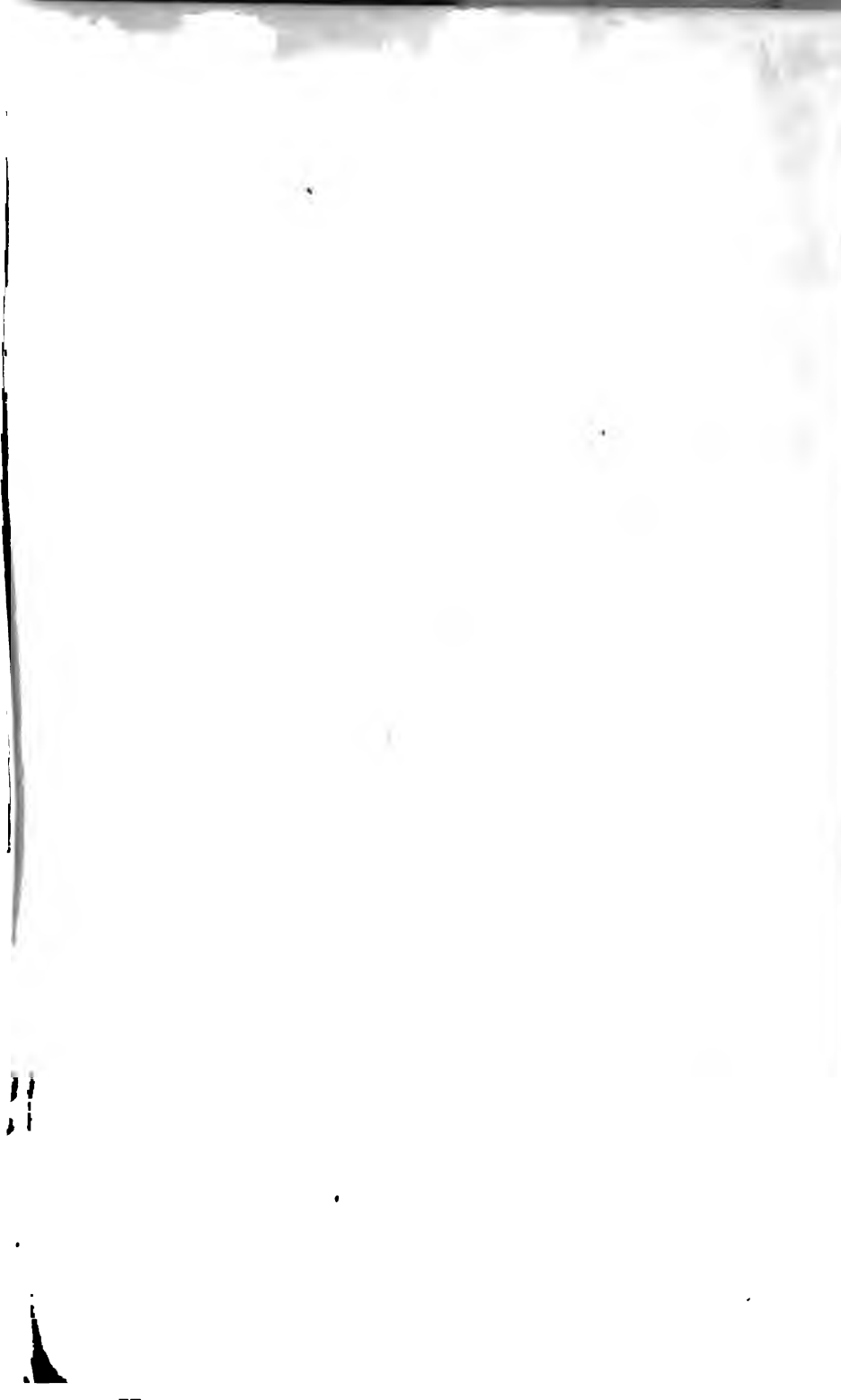
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REPORTS

OF THE

CIRCUIT COURT OF THE UNITED STATES,

FOR THE FIRST CIRCUIT.



REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT COURT OF THE UNITED STATES,

FOR THE FIRST CIRCUIT.

VOLUME II.

CONTAINING THE CASES DETERMINED IN THE DISTRICTS OF NEW
HAMPSHIRE, MASSACHUSETTS AND RHODE ISLAND,
IN THE YEARS 1814 AND 1815.

BY JOHN GALLISON,
Counsellor at Law.

BOSTON :

PUBLISHED BY WELLS AND LILLY.

.....
1817.

DISTRICT OF MASSACHUSETTS, TO WIT:

District Clerk's Office.

BE it remembered, that on the eighteenth day of November, A.D. 1817, and in the forty-second year of the Independence of the United States of America, *John Gallison*, of the said District, has deposited in this Office the Title of a Book, the Right whereof he claims as Proprietor, in the words following, *to wit*—Reports of Cases Argued and Determined in the Circuit Court of the United States, for the First Circuit. Vol. II. Containing the Cases determined in the Districts of New Hampshire, Massachusetts and Rhode Island, in the years 1814 and 1815. By *John Gallison*, Counsellor at Law.

In conformity to the act of the Congress of the United States, entitled "An Act for the encouragement of learning, by securing the copies of maps, charts and books, to the authors and proprietors of such copies, during the times therein mentioned," and also to an act, entitled "An act, supplementary to an act, entitled, an act, for the encouragement of learning, by securing the copies of maps, charts and books, to the authors and proprietors of such copies, during the times therein mentioned; and extending the benefits thereof to the arts of designing, engraving and etching historical and other prints."

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MOST of the questions, which are agitated in the Courts of the United States, are remote from any of the ordinary subjects of discussion in other tribunals. They form a new and distinct branch of law, connected with some of our most important rights and interests.

The construction of the federal and state constitutions, of treaties, and of the laws regulating our foreign commerce; the fixing of the boundary, which marks the division of power between the whole confederacy, and its several members; the limits of the jurisdiction of the national courts, as courts of common law, chancery, admiralty and prize; in what cases this jurisdiction is exclusive, and in what concurrent with the courts of the several states; all these are topics, which must long continue to supply cases of great legal doubt, the decisions upon which will form a body of public law of the United States.

The revenue laws afford another class of questions of great interest, not only to the citizen, who may often be compelled to resort to the treasury for relief from penalties incurred through mistake or ignorance ; but to the numerous officers, who are appointed to watch over the execution of these laws, and to whom an accurate knowledge of the extent of their powers and duties is in the highest degree important.

If to these are added the many admiralty and maritime causes, which affect the interests of navigation and commerce ; the large class of contracts and civil injuries, as well as crimes and offences, which belong to this branch of the jurisdiction of the federal courts ; it will be sufficiently apparent, that their decrees ought not to be confined within the walls, where they are pronounced. Nor is it enough to publish the decisions of the Supreme Court only. Those of the Circuit Courts are final in by far the greater part of the cases, that are brought before them. In revising, on writs of error, the judgments of the District Courts, they must in all cases decide in the last resort, with the single exception provided by the sixth section of the Act of 1802, ch. 31. Numberless questions will

necessarily arise and receive their determination in these courts, especially in commercial districts and in cases relating to the revenue laws, which will never reach the Supreme Court. Of this fact abundant proof will be found in the ensuing volume.

These considerations will, it is hoped, be sufficient to excuse the addition of another to those numerous volumes of Reports, to which, at their present rate of increase, the "*mille plaustrorum onus*" of *Heineccius** may soon, without a very extravagant hyperbole, be applied. If any thing may be anticipated from the favourable reception of the former volume, that now offered, containing cases not less important in principle or useful in practice, will not be unacceptable to the profession.

In stating the arguments of counsel, the reporter has aspired to no other merit, than that of being brief, accurate and perspicuous. He alone must, in general, be responsible for the language employed. Where the case appeared to possess a more than ordinary degree of importance, the arguments have been reported in a more extended form. All the authorities cited have, it is believed, been re-

* Preface to Vinnius.

tained, and the references, both in the arguments and opinions, have been carefully compared with the books referred to. Particular care has been taken to notice and preserve such points of practice, as arose incidentally, and were not of sufficient importance to call for a written opinion.

But, whatever care and diligence may have been used, the reporter is conscious of many defects, for which he must claim the indulgence of the profession.—At the period, which closes the present volume, he found his other engagements incompatible with a farther attention to the duties of reporting. The work will be continued by a gentleman, whose qualifications ensure the successful performance of his undertaking.

Boston, Nov. 1817.

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CIRCUIT COURT OF THE UNITED STATES,

MASSACHUSETTS, OCTOBER TERM, 1818, AT BOSTON.

[Continued from the first volume.]

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
 { Hon. JOHN DAVIS, District Judge.

THE DESPATCH AND CARGO, BANCROFT, MASTER, COOLIDGE, &c.
CLAIMANTS.

In cases of joint capture by privateers, they share in proportion to the number of men composing their respective crews.

STORY, J. The brig *Despatch* and cargo were captured by the privateer *Castigator* in company with the privateer *Fame*, and, upon the whole evidence in the cause, it appears to be a clear case of joint capture.

By consent of the parties, a decree *pro forma* in favour of the captors has been rendered against the claimants, upon which an appeal is to be interposed, and the only question, remaining for the consideration of the Court, is the relative proportion, in which the privateers shall respectively share.

The *Castigator* had one gun of 6 lbs. and 19 men, and the *Fame* two guns of 4 lbs. and 18 men.

As between public ships of the *United States* this point is settled by the 7th article of the rules for the distribution of prizes, in the act of April 23d, 1800, (5 vol. U. S. laws, 108.)

which provides, that in cases of joint capture, the capturing ships shall share "according to the number of men and guns on board each ship in sight." But as to private armed ships, no regulation has been adopted, and of course the distribution must be governed by the general rules of the prize jurisdiction.

Upon general principles, it would seem reasonable, in cases of joint capture, that the distribution should be made according to the relative strength of the capturing ships. In that proportion the intimidation of the enemy, which would lead to a surrender, would ordinarily be supposed to exist, where no battle should be actually fought; and in cases of actual battle, the degree of injury done to the enemy would be estimated in the same manner. And, in a middle class of cases, where one ship was actually engaged, and the other only in general cooperation, the ultimate surrender might be well attributed, as much to the despair of escape from the combined force, as the immediate injury from the engaging force. And, indeed, to attempt a discrimination founded upon different degrees of exertion, would be very difficult, if not wholly impossible, in practice. *Bynkershoek*, therefore, and he alone is a great authority, lays down the rule, that the parties shall, in joint captures, share in proportion to their respective strength.¹ And this I apprehend to be the rule adopted in the Prize Courts of *England* and *France*; and perhaps it forms the basis of the distribution among the other maritime powers of *Europe*.²

In the manner of estimating the relative strength a great diversity of regulation exists. *Valin* in his treatise of prizes,³ states that in *France* the mode varies in three classes of

¹ *Bynk. Q. Pub. Juris* : chap. 18. *Per Dup.* 164.

² *Vide Duckworth v. Tucker*, 2 *Taunt. Rep.* 7.

³ *Des prises* chap. 19.

Despatch and Cargo.

cases of joint capture. 1, Between a public ship and a privateer, the distribution is in proportion to the number of cannon. 2, Between privateers, in proportion to the force and equipments, the number and the caliber of the cannon of the respective ships; and the estimate in this case, depending upon such heterogeneous and complex combinations, is reduced to an unity of denomination by an arbitrary valuation of the component parts. 3, Between public ships, in proportion to the number and caliber of their respective batteries of cannon.

In *England*, as between public ships, cases of joint capture do not present any difficulty in the distribution. By the King's proclamation, the whole property is shared by all the officers and crews of the capturing ships according to certain fixed proportions, in which all the officers of equal rank obtain an equal share. For instance, the captain of the capturing ship is entitled to three eighths of the prize, and in joint captures, the same three eighths are distributed equally among all the officers of that rank.⁴

As to privateers, no statute regulation exists, and therefore their claims are settled by the general law of relative strength. This relative strength is to be measured, as has been settled by solemn adjudications at the cockpit and in the King's Bench, by the number of men on board each ship.⁵ This rule has the advantage of great practical simplicity and general equity. It seems bottomed on the soundest sense, and places the relative force in the power and activity of animated beings, in which it must always ultimately reside, rather than in the mere instruments, which without such power and activity would be useless and unavailing.

I consider this rule of the Admiralty, as decisive of the present claims, and I accordingly adjudge and decree, that the privateer *Castigator* shall be entitled to 19-37th parts,

⁴ 2 *Rob. App. No. 9.*

⁵ *Roberts vs. Hartley, Doug. 311.*

Boat *Eliza* and Cargo.

and the privateer *Fame* to 18-37th parts of the property subject to condemnation, to be distributed among the officers, crews and owners, of said privateers, respectively, according to law.

Williams for the *Castigator*,
Cummings and *Sprague* for the joint captors.

BOAT *ELIZA* AND CARGO, WILSON, INGLES, &C. CLAIMANTS.

A "foreign port or place," within the meaning of the 1st section of the act of 6th of July 1812, chap. 129, is a port or place within the sovereignty of a foreign nation.

The 6th section of the coasting act, of February 1793, chap. 8, inflicts a forfeiture of the ship and cargo only in cases of unregistered vessels, found with foreign goods on board, in the coasting trade, and not of vessels licensed for the fisheries.

If a vessel licensed for the fisheries be engaged in an illegal traffic, she is forfeited under the 32d section of the coasting act.

If the claimant does not shew a good title to the property, it will not be restored to him, although it is not condemned as forfeited. But it will be retained in the registry until the real owner appears and proves his title.

In such a case, if the property has been engaged in a trade with the enemy, the United States may proceed against it, as prize of war.

STORY, J. The boat *Eliza* and cargo were seized by the *Revenue Cutter*, belonging to the district of *Boston* and *Charlestown*, on or about the 29th day of September, 1813, for an alleged forfeiture under the laws of the *United States*. The information propounded in the cause contains three counts, 1st, for an alleged departure of the vessel from *Boston* bound to some foreign port or place without having given the bonds required by the act of the 6th of July, 1812, chap. 129, section 1.—2d, for the vessel's having on board goods of foreign growth and manufacture, and being found trading between different places in the district afore-

Boat *Eliza* and Cargo.

said, without being enrolled and licensed therefor, contrary to the 6th section of the act of 18th February, 1793, chap. 8, regulating the coasting trade and fisheries.—3d, for the said vessel's being employed in a trade, other than the fisheries, for which she was licensed, contrary to the 32d section of the act last mentioned.

From the evidence in the cause it appears, that the *Eliza* is a vessel of 20 tons burthen and upwards, and regularly licensed for the fisheries. On or about the 28th of August last past, *Wilson*, the owner and claimant of the *Eliza*, was applied to, and contracted with Mr. *Woodward*, as agent for the claimant, Mr. *Inglee*, to take on board two cases of wine, one box of bottled cider, one box of cigars, and some other articles of provisions, which had been previously purchased by Mr. *Woodward* for the account of Mr. *Inglee*, and to transport the same to a schooner, which would (as was alleged) appear in *Boston Bay*, at a few leagues from land. The schooner was described to be a large black schooner, with a white signal at her foretopmast head. *Wilson* was to be allowed \$10 for every day, not exceeding five days, during which he should be employed in cruising, in order to find said schooner, and for every day exceeding five days, he was to be allowed \$7, and if the schooner was not found within ten or twelve days, he was at liberty to return with the goods. It is stated to have been represented to *Wilson*, that the employment, in which he was then engaged, was not illegal. But the fact cannot be material, as it forms no justification for any actual violation of law.

On the next day, the *Eliza* was boarded on the high seas, off the west end of *Long Island*, by the *Revenue Cutter*, and upon search and examination was seized. Sundry letters were found on board, two of which were without signature, and one partly written in cipher, and in enigmatical language.

The claimants attempt to justify themselves in this enterprise, by alleging that the provisions were designed for a Swedish ship, which was expected in *Boston Bay*, and were purchased at the special request of the captain of that ship by Mr. *Inglee*, who is his friend and agent. And in confirmation, a letter is produced by Mr. *Inglee*, purporting to be signed by "*P. Stromberg*," and dated "*at Eastern Port, 16th August, 1813,*" which Mr. *Inglee* alleges was delivered to him in the street by an unknown person, and that "*P. Stromberg*" is a Swede well known to him, as the writer of the letter. The first clause in the letter is, "I sail in five or six days from this, bound to a southern port, in the Swedish schooner ———" and the writer then proceeds to state, that he has passengers on board and wishes the wine, &c. to be procured for him. On this letter I cannot but remark, that it is not strictly evidence in the cause. There is not a shadow of evidence, independent of Mr. *Inglee's* affidavit, to shew its authenticity, and he is not competent in this case to prove it. I confess myself not much better satisfied on examining the contents of the letter. It carries upon its face the most evident marks of being merely colourable. It states no port from whence written, and no vessel, which the party commands. The directions are such, as would very properly apply to a case, where a fraudulent or inimical traffic was intended. If such a vessel so commanded were in any eastern port, why has there been no proof of the fact? If she was bound to some southern port, why is her arrival not shewn? If there was a Swedish vessel really bound to a southern port, why should wine be ordered at *Boston*? If a supply were necessary for the ultimate voyage, why should it not be purchased at the southern port of destination? We all know, that wines are common in almost all the principal ports of our country; and I should be glad to know, why they might not have

been purchased at "the eastern port" where the vessel is supposed to have been. The mysterious letters found on board evidently point to other transactions, than such as innocence would authorize. They connect themselves with the other circumstances of the case, and throw over it a load of suspicion, from which no ingenuity of counsel can relieve it. I have no hesitation in declaring my perfect conviction, that the whole of this transaction was founded in an illegal contract, and if this had been a process on the prize side of the Court, I should have felt no difficulty in applying the penalty of confiscation for trade with the public enemy.

Under this view of the facts, it remains for me to consider, how far they shew any infraction of the municipal laws of the *United States*.

It has been contended, on the part of the *United States*, that the case comes within the prohibitions of the first section of the act of the 6th of July, 1812, chap. 129. That section provides, in substance, that if any vessel, owned in whole, or in part, by a citizen of the *United States*, shall depart from any port of the *United States*, "for any foreign port or place," without giving the bond prescribed in the same section, the vessel and cargo shall be forfeited.

And it is urged, that the being bound to the high seas, without the jurisdictional limits of the *United States*, is being bound "to a foreign place" within the meaning of the statute. I consider this construction utterly untenable on principle and authority. It is clear to my mind, that a "foreign port or place," in the statute, means a port or place exclusively within the sovereignty of a foreign nation. Such has been the construction of the same words in the 3d section of the act of the 9th of January, 1808, chap. 8, by the Supreme Court of the *United States*. Such has been the uniform construction in the District

and Circuit Courts of this Circuit, in cases where words of a similar import have been drawn into controversy : and I shall therefore content myself with a bare expression of my opinion on this point, without entering into the reasons, which cogently press it upon me. The first count must therefore be abandoned.

The validity of the second count depends on the true construction of 6th section of the coasting act of 18th February, 1793, chap. 8. That section provides, in substance, that every unregistered ship or vessel, of 20 tons and upwards, found engaged in the coasting trade or fisheries without being duly enrolled and licensed, if in ballast or laden with goods of domestic growth or manufacture, (distilled spirits excepted,) should pay the fees and tonnage of foreign vessels, and if having on board goods of foreign growth or manufacture, or distilled spirits, the ship and cargo should be forfeited. It is contended, that the true meaning of this section is, that every vessel not having a license for the employment, in which she is engaged, is forfeited, if she has foreign goods on board, although she has been enrolled and licensed for another employment under the act. I cannot accede to this construction. On the contrary, I think, that the language and the intent of the section may be satisfied by confining the forfeiture to unregistered vessels, found with foreign goods on board, in the coasting trade or in the fisheries, without enrolment and license for either employment. I am the more confirmed in this view by the language of the 32d section of the same act, which imposes a forfeiture for the identical offence supposed in the argument to be comprehended in the 6th section. Unless the conclusion were unavoidable, I should not incline to presume a legislative intent twice in the same statute to enact a penalty for the same offence. This is not the only difficulty. Upon the construction urged in be-

half of the *United States*, if a vessel licensed for the fisheries were found engaged in the coasting trade, or a vessel licensed for the coasting trade were found engaged in the fisheries, *with domestic goods only* on board, such vessel would, under the 6th section, be considered as incurring no penalty, and as merely subjecting herself to pay the fees and tonnage of a *foreign vessel*. It is clear, however, that such an employment would be a gross violation of her license, and, under the 32d section of the act, would subject her to forfeiture and condemnation. Now it seems to me difficult to maintain that construction of a statute to be a sound one, which punishes in one section, what in another section it does not deem unlawful ; that it should provide for the payment of fees and tonnage, as of a foreign vessel, where it sweeps the whole property from the owner upon the ground of illegal traffic. I am therefore satisfied, that the construction of the 6th section, urged by the *United States*, ought not to prevail.

It may not, however, be absolutely necessary to decide this point, because, if the case fall within the prohibitions of the 32d section of the same act, the forfeiture will reach the vessel ; and the cargo, under either section, must share the same fate, unless saved by the redeeming proviso of the 33d section of the same act.

I come therefore to the third count, founded on the 32d section. And in my judgment it is fully supported by the evidence. It is clear, that the *Elisa* was employed in a trade, other than that for which she was licensed. She was licensed for the fisheries, and she was employed in the transportation of merchandise for hire. This was a traffic or business wholly beside the nature and object of her license. It was a "trade" in the sense, in which that term is used in the statute, as equivalent to employment or business.

It has been argued, that the great object of the statute was, to protect the revenue, and therefore, that no trade is within the prohibition, except a trade in fraud of the revenue. Against this construction the language of the section may be strongly urged, which makes no such exception, and where none is made by the legislature, I am not bold enough to create one. But this distinction has been directly overruled by the Supreme Court in a recent decision.¹ And it may therefore be considered as the settled law, that the forfeiture attaches in every case of a trade, of whatever nature and with whatever object, which is not expressly authorized by the tenor of the license.

As to the intentions of Mr. *Wilson* in engaging in this transaction, if they were perfectly innocent, as he has endeavoured to prove, I sincerely regret the unfortunate predicament in which he has placed himself. Still, this innocence of intention can afford no protection against the penalty imposed for a breach of the act. If a law be actually violated, it is immaterial, whether the offence be by wilfulness or negligence, by deliberation or by mistake. In either case the court is bound to enforce the rigour of the law, and leave to another tribunal the more benignant prerogative of mercy, in cases where it ought to be bestowed.

I feel myself bound, therefore, to condemn the vessel and her appurtenances, as forfeited.

As to the wine and other articles on board, claimed by Mr. *Inglee*, as his own property, as they do not appear to have belonged to the master, owner, or mariners of the *Elisa*, they are saved from forfeiture by the proviso of the 33d section of the act, *if they are not liable to duty*, or the duty on them has been actually paid or secured. Such is the construction given to this proviso by the Supreme Court.² As

¹ *The United States vs. Sloop Active*, 7. *Crunch*, 100.

² *United States vs. Sloop Active*.

Ex parte, Newman.

to the wine, having been purchased in the open market, a presumption of its fair and regular importation does, under the circumstances of this case, certainly arise. The other articles, being of domestic produce, are exempted from duty.

I cannot however restore these articles to Mr. *Inglee*. He claims them, as his own property, but upon his own shewing they are the property, and were purchased with the funds, of another person. Who that person is, I will not now undertake to decide. It is sufficient that Mr. *Inglee* has no claim. As the cause affords very strong presumptions, that these articles actually belonged to, or were destined for the use of, the public enemy, I shall order the proceeds to be brought into court, and deposited in the registry, there to remain until the real owner shall appear and prove his right, or the *United States* shall choose to interpose a claim for the property as prize of war.

Lest this decision should be misunderstood, I would add, that it is only in cases, where the constancy of property in the claimant is rebutted in the evidence, that I should feel at liberty to retain the proceeds in court. ³

Vessel condemned.

³ Vide *the Aquila*. 1 Rob. 37, 41.

EX PARTE, NEWMAN.

An alien enemy cannot be permitted to make the declaration required by law preparatory to the naturalization of aliens.

J. T. Austin, in behalf of *Newman*, who is an alien enemy, moved the court to permit him to file his declaration, preparatory to naturalization, according to the act of 14th of April, 1802, chap. 28.

Ex parte, Newman.

STORY, J. The petitioner is an alien enemy, and therefore has no legal standing in court to acquire even inchoate rights. We have so held on a former application. The act of Congress of 30th of July, 1813, chap. 135, on which this motion is founded, does not apply. That act enables persons, who before the war had made the preparatory declaration, to become citizens in the same manner as if war had not intervened. But it confers no privileges on other persons. The petitioner, therefore, cannot exempt himself from the general disability.

DAVIS, District Judge, concurred.

Motion denied.

CIRCUIT COURT OF THE UNITED STATES,

RHODE ISLAND, NOVEMBER TERM, 1813, AT PROVIDENCE.

[Continued from the first volume.]

REPORT } Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
 } Hon. DAVID HOWELL, District Judge.

EVANS vs. POTTER.

A factor is bound to good faith and reasonable diligence. He cannot pledge the property of his principal for his own debts ; but he may for the payment of the duties accruing on the specific goods.

ASSUMPSIT for breach of orders, against the defendant, who was master and also consignee of an adventure of the plaintiff put on board the ship *Robinson Potter*, on a voyage from *Philadelphia* to *Archangel* and back to the *United States*.

The controversy, at the trial, turned principally on matters of fact, as to the correctness of the conduct of the defendant, under all the circumstances.

STORY, J. in summing up to the jury, said—a factor is bound to ordinary diligence in relation to the property confided to him. Where his orders leave the management of the property to his discretion, he is bound only to good faith and reasonable conduct. He may lawfully do whatever the course and usage of the trade requires ; and, indeed, unless his orders restrict him, he is bound to conform to this course of

Evans vs. Potter.

the trade. In no case can he wantonly sacrifice the property without being responsible to the shipper. If he can advantageously sell the property, and neglect so to do, he must answer in damages. But if the markets be low, or unusually crowded, if new and unexpected difficulties arise, he is not obliged to sell at all events and under every disadvantage. Neither the interests of commerce, nor the good faith due to his employer, would countenance such a proceeding.

Neither can a factor lawfully pledge the property of his principal for his own private debts; but he may lawfully pledge it for the duties accruing thereon; or for any other purposes, which the usage of trade sanctions and approves.

HOWELL, District Judge, concurred.

Verdict for the defendant.

Searle and Trist. Burgess, for the plaintiff.

Burrill and Dexter, for the defendant.

CIRCUIT COURT OF THE UNITED STATES.

NEW HAMPSHIRE, MAY TERM, 1814, AT PORTSMOUTH.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
Hon. JOHN S. SHERBURNE, District Judge.

UNITED STATES vs. BACHELDER.

An officer of the customs, duly commissioned, and acting in the duties of his office, is presumed to have taken the regular oaths.

If the collector appoints and commissions an inspector, the approbation of the Secretary of the Treasury is presumed.

What is a sufficient allegation of a *forcible* impeding within the act of 2d of March, 1793, chap. 122, section 71.

Is an indictment for a statute offence, it is sufficient if the offence is substantially set forth, though not in the exact words of the statute.

It is not necessary, in an indictment for resisting a publick officer, to set forth the particular exercise of office, in which he was engaged, or the particular act and circumstances of obstruction.

THIS was an indictment against the defendant for an obstruction of one *Nehemiah Jones*, an inspector of the customs, in the duties of his office. The indictment charged as follows :

“ That the said *Bachelor*, on the 10th day of October A. D. 1812, at *Amherst*, in said district, did with force and arms violently and unlawfully resist, prevent and impede *Nehemiah Jones* of, &c. in the execution of his office,

as an officer of the customs for the port and district of *Portsmouth* in said *New Hampshire* district, he the said *Nehemiah Jones*, being then and there an officer of the customs as aforesaid, to wit, an inspector of said port and district of *Portsmouth*, duly appointed and authorized to seize goods imported into said *New Hampshire* district contrary to law, and being then and there in the peace of the said *United States*, and being also then and there in the due execution of his said office, as aforesaid, having then and there seized and holding in his possession for trial, as the duty of his office required, a certain trunk containing goods and merchandise, nineteen dozen of cotton hose, of the value, &c. as having been imported into the said *United States*, and into said *New Hampshire* district, contrary to law, and the said *Bachelder* then and there, with the same force and arms, did seize and wreat and carry away the said trunk containing the goods and merchandise aforesaid from the possession and custody of the said *Jones*, to a distant place."

The defendant was arraigned and tried on the indictment at October Term, 1813, and a verdict of guilty was found by the jury.

At the trial, the Court, after summing up the facts, stated to the jury, that if an officer of the customs be duly commissioned and be found acting in the duties of his office, the law presumes that he has taken the regular oaths until the contrary is shewn. That if the collector of the district appoints and commissions an inspector, the consent and approbation of the secretary of the treasury, as required by the act of 2d of March, 1799, chap. 128, section 21, is presumed until the contrary is shewn.¹ That if an officer of the customs has seized property as forfeited and it is tortiously taken away from him, while under *his personal*

¹ Ante, vol. 1, p. 222, *United States vs. Sears*.

and immediate superintendence and custody, the law implies that the taking is forcible ; and if the rescue be for the purpose of impeding or preventing him from following up his seizure and conveying the property to a place of security to await a legal adjudication, it is a " forcible impeding" &c. within the meaning of the act of 2d of March, 1799, chap. 128, sect. 71. That it is not necessary, on an indictment for such an offence, to prove that the property seized was actually condemned. It is sufficient, if the officer were acting within the line of his duty, and his conduct be founded on probable cause of suspicion of illegal importation.

After the verdict, a motion was made in arrest of judgment for the insufficiency of the indictment ; and at this term it was argued by *Cutts* and *Mason* for the defendant, and *Humphreys*, District Attorney, for the *United States*.

The counsel for the defendant argued, that the indictment was insufficient ; because the offence was not specially set forth in the indictment, nor alleged in the language of the statute. The forms of indictments in England for obstructing customhouse officers state more specially the nature of the offence and the circumstances attending it. There is no allegation here, that the goods were illegally imported, or that the inspector had probable cause to suspect an illegal importation, or was searching for the purpose of ascertaining their character, and as to the necessity of certainty in indictments they cited 4 *Hawk. P. C. chap. 25, section 29*, &c.

Further, the indictment does not allege the offence in the words of the statute. This is necessary, and the defect is fatal.² The manner and the special act of resistance ought also to have been set forth.

² 2 *Hawk. P. C. chap. 80, section 23*.

Humphreys for the *United States*. The indictment contains every material allegation required by the statute. It is true, that the exact words of the statute are not used, but words of the same meaning are ; and it is sufficient to set forth the substance, without adhering to the technical wording of the statute. The word "violently," is equivalent to "forcibly."

By the Court. The objections moved in arrest of judgment cannot prevail. It is not in general necessary, in an indictment for a statutable offence, to follow the exact wording of the statute. It is sufficient, if the offence be set forth with substantial accuracy and certainty to a reasonable intendment. The cases cited from the common law, where a different rule is supposed to prevail, do not apply. In those cases the very technical words used are those only, which constitute the specific offence. The law allows of no substitute in the indictment, because no other words are exactly descriptive of the offence.

It is not necessary, in an indictment for the obstruction of publick officers, to set forth the particular exercise of office, in which they were engaged at the time, or the particular act and circumstances of obstruction. These are properly matters of evidence ; and so in fact are the best precedents.³ And this is a sufficient answer to the objection of a want of specific allegations as to any illegal importation, or just suspicion thereof. Admitting that the special statement as to these facts, in the indictment, were not sufficient ; still the indictment contains a direct allegation of the substance of the offence, and the mere introduction of surplusage does not vitiate.

As to the objection, that the offence is not alleged in the words of the statute, it is certainly to be regretted, that an

³ *Crown Circuit Comp.* 161, 166, 176, 177.

 St. Lawrence and Cargo.

error, so easily avoided, should have crept in. The words of the act are "if any person shall forcibly resist, prevent or impede, any officers of the customs, &c. in the execution of their duty," &c. The averment in the indictment is, that the defendant "did with force and arms violently and unlawfully resist, prevent and impede," &c. Now, even supposing that "violently and unlawfully" are not equivalent with "forcibly," still the objection must be overruled, for "forcibly" doing an act is merely doing an act with force; and therefore the offence is substantially stated. Judgment must therefore be entered on the indictment.

Judgment against the defendant.



THE ST. LAWRENCE AND CARGO.

A Court of prize will take cognisance, not only of all questions of prize, but of every incident thereto, until a final adjustment of all claims arising from the capture. It will, therefore, entertain a supplemental suit for the distribution of prize proceeds.

Where the proceeds have been paid to prize agents, and the cause is no longer pending, the proper jurisdiction is the District Court. Where the proceeds remain in the Circuit Court, application may be originally made there, to compel distribution.

The prize act of 27th Jan. 1813, chap. 155, authorising the Marshal to make distribution, does not narrow this jurisdiction. He still acts subject to the control of the Prize Court.

That act does not apply to sales made under interlocutory decrees, but only to sales after final condemnation.

Of the appointment, duties and authority of prize agents.

Prize agents have a lien on the prize proceeds for their disbursements and commissions. And this applies to prize agents *de facto*, though irregularly appointed.

In the absence of all other regular prize agents, the owners of the ship and their agents are entitled to the trust, management and control of the captured property for the benefit of all parties.

Prize agents have an authority coupled with an interest, and cannot be divested of their authority, so as to take away their title to claim from the proceeds their

St. Lawrence and Cargo.

disbursements and commissions. But when these are paid, the officers and crew have a right to take their shares directly at the hands of the Court.

A commander of a privateer, who is authorized to award certain reserved shares among the most deserving in the cruise, cannot award a share to himself. He is a trustee for others, and not for himself.

THE decree of this court, condemning the ship *St. Lawrence* and cargo as prize to the captors, having, with the exception of two suspended claims,¹ been affirmed by the Supreme Court, and the cause having been remanded for further and final proceedings, an application by way of petition was made in behalf of the captain and some of the officers and crew of the capturing ship (the *America*) to have their respective shares of the prize proceeds, when ascertained, paid into the hands of their particular agents, and not into the hands of the supposed general agents of the ship.

This application was resisted by *Pitman*, of counsel on the part of the ship owners, and the supposed general agents Messrs. *Prince* and *Deland*, who asserted their right to a delivery of the whole prize proceeds into their hands, to secure their equitable liens for advances, expenses, disbursements and commissions incurred or made during the cruise.

On the other hand, *J. T. Austin*, for the petitioners, contended first, that Messrs. *Prince* and *Deland* were never legally appointed general agents; secondly, if legally appointed, that their authority had expired; thirdly, if the authority were permanent in its form, that it had been legally revoked, and lastly, that at all events they were entitled to a direct payment of their respective shares, after deducting all the legal charges of the agency.

¹ These claims were also rejected at the next term of the Supreme Court. 9 *Cranch*, 120.

STORY, J. There can be no doubt of the general jurisdiction of the admiralty to take cognizance not merely of the question of prize, but of every incident thereto until a final adjustment of all claims arising from the capture. This is a part of prize jurisdiction, which is settled by solemn authority, and indeed seems essential for the purposes of complete justice in all proceedings *in rem*.² Independent therefore of any provision by statute, the right of regulating conflicting claims, of ascertaining the title, character and number, of the captors, and of awarding a final distribution of prize property, attaches as an ordinary incident to the possession of the principal cause. And the courts of the *United States*, in the exercise of admiralty and maritime jurisdiction, possess the right in as ample a manner as the prize courts of *Great Britain*.

It is true, that the Act of Congress of the 27th of January, 1813, chap. 155, has authorized the Marshal to make distribution of prize proceeds, which come into his hands upon sales made after final condemnation. But this provision was not intended to narrow the jurisdiction of the proper prize court, but merely to avoid the delays incident to sales made during a vacation of the court, and in plain cases to facilitate to the parties the acquisition of their respective shares. Even in these cases, however, the distribution is still subject to the control and regulation of the prize court, whose duty it is to ascertain the proper parties entitled to share, and in case of doubt or difficulty to adjust the contested claims.

In the case before the court, the property was sold under an interlocutory order before final condemnation, and the proceeds brought into the registry to abide the final decision of the appellate court. The provisions of the Act of

² See *Smart vs. Wolff*, 3 T. R. 323, *Home vs. Camden*, 1 H. Bl. 476,—2, H. Bl. 533, &c.

Congress do not therefore apply ; the distribution must be made by the court itself in the exercise of its ordinary functions. It would seem to follow, that in order to make such distribution, the court must first adjust all the claims, which attach as equitable demands upon the prize proceeds, and perform in some sort that duty, which is ordinarily performed by the Marshal.

Although the general jurisdiction for all these purposes seems incontestable ; yet, at the argument, a suggestion was thrown out by the court, how far it ought to entertain cognizance as a mere appellate court, over some of the collateral questions which the parties had brought before it, some of these questions seeming more fit to be discussed before a court of original prize jurisdiction. Upon mature reflection and examination of authorities, I am entirely satisfied, that all questions relative to prize property, and of course all incidental claims upon it by reason of the capture, properly belong to the court having possession of the property either actually, or in contemplation of law through prize agents, or having a right to call for the property in order to execute its decrees, and enforce the rights of the parties connected with its proceedings ; and that it is perfectly immaterial whether the court possess the cause as of original jurisdiction or by appeal. Not to mention authorities in the admiralty, the reasoning in *Smart vs. Wolff*, 3 T. R. 323, *Home vs. Camden*, 1 H. B. 476, 2 H. B. 533, 4 T. R. 382, and *Willis vs. the Commissioners of Prize Appeals*, 5 East 22, is in my judgment decisive.

Having disposed of this preliminary ground, I come to the consideration of the questions, which have been made by the parties at the bar.

The 11th article of the shipping articles of the privateer provides, " that the captain and officers of said ship shall appoint an agent or agents for said vessel's company for and

during the term of said vessel's cruise." Under colour of this clause, the captain and the greater part, if not all, of the officers, by a printed instrument, better adapted in its language to the case of an agency for an individual of the crew, appointed Messrs. *Prince and Deland*, in terms, "their agents;" and the owners of the privateer also appointed the same gentlemen their agents for the cruise.

Several exceptions have been taken to the validity of this appointment, as a good appointment for the officers and crew under the shipping articles. The first is, that it does not, on its face, purport to be an appointment for the officers and crew, but only for the officers. And certainly, if we are to be governed by merely technical propriety, the objection seems well founded. But, inasmuch as the shipping articles did not require the appointment to be made in any technical or solemn form, I am unwilling, in an instrument executed by unskilful persons, relative to maritime transactions, to admit the strictness of the common law to destroy the manifest intention of the parties. Upon a reasonable construction of the articles, an appointment, made by the captain and officers, of their agents for the cruise, may well be held an appointment to enure for the benefit of the whole crew of the ship.

A second exception is, that the appointment was made by a majority of the officers, and not by all the officers, as the articles require. Admitting the fact, that all the officers of the ship, entitled to vote in the appointment, did not cooperate, which seems questionable, I am not sure that an appointment by the captain and a majority of the officers ought not, in articles of this nature and for these purposes, to be deemed a good execution of the authority.

A third exception is, that the appointment was to subsist only during the cruise, and that by lapse of time, the cruise being ended, it has expired. In my judgment, it

would be a violation of the obvious intent of the parties, to adopt this limited construction of the power to appoint. It would be saving the letter and extinguishing the spirit of the agreement. The manifest intent of the parties was, that the officers and crew should have agents to act for them in every thing touching that cruise, whose power should exist as long as the business or objects of the cruise remained unaccomplished. But such agency was not to extend to any future cruise of the privateer.

A fourth exception is, that the appointment has been revoked. If this were true in point of fact, it could not be held to devalue the agents of any previously acquired interests in the nature of liens on the prize proceeds; and if done without good cause, I do not think the court ought to refuse to allow a liberal recompense for their services. But, in point of fact, there has been no revocation of the appointment by a majority of the officers; and it would have been a breach of good faith towards the crew to have made any such revocation, if practicable, unless for good cause, followed up by a new appointment. The authority to appoint is joint and not several, and it would be highly injurious to all parties to suffer a general appointment to be controlled by the interested or perverse opposition of one or two individuals.

However, I do not think it necessary very nicely to sift these objections, or one of a more grave character, which was reluctantly urged by counsel, and if true, (which I do not incline to believe) would have cast a shade over the agency of these gentlemen; for there is one circumstance decisive against all these objections, and that is the fact, that Messrs *Prince* and *Deland* have, with the entire acquiescence and tacit consent of all parties, acted as general agents from the commencement of the cruise to the present time. As general agents *de facto*, they have had the su-

perintendance of all prizes, the payment of all advances and expenses, and the distribution of all prize proceeds; and from their hands the captain, officers and crew, have received their shares of such proceeds without a murmur or complaint. As agents then *de facto* they are entitled to every indulgence as to their claim, which the most formal appointment would have conferred upon them.

Another consideration also, which renders the discussion of the formal authority of Messrs *Prince and Deland* from the officers in a great measure unimportant, is the fact, that they are the acknowledged agents of the owners of the privateer. In the absence of all other regular ship's agents, the owners of the ship and their agents must be entitled to the trust, management and control of the captured property for the benefit of all parties. They are considered as the *duces facti*; they are responsible to the government and to strangers for the conduct of the ship and crew; and this not merely by the regulations of statute, but by the general maritime law. This is laid down in emphatic terms by *Bynkershoek*,³ and is the settled rule of prize courts. As general ship owners, and as parties upon whom the law devolves the general responsibility, I apprehend that they are entitled to direct the conduct of the privateer during the cruise, and regulate the prize proceedings, as to the captured property. The law constitutes them, in the absence of all contrary stipulations, the general trustees or agents for all parties. And I may add, that the Acts of Congress of the 26th of June, 1812, ch. 107, and of the 27th of January, 1813, ch. 155, evidently contemplate this general character of the owners. If, then, there was no valid appointment by the officers, the trust and management of the prize property devolved on the owners and their authorized agents. *Quacunque via data est*, as

³ *Quest. Jur. Pub.* ch. 19.

agents *de facto*, or as agents of the owners, Messrs. *Prince* and *Deland* are entitled to all the rights, which the character of general agency confers over prize proceeds.

What these rights are, I next proceed to consider. The agents have certainly an authority coupled with an interest, and the authority cannot be taken away from them without in the first place discharging that interest. But when once that interest is discharged, I do not perceive, but that the respective parties entitled to share in the proceeds have a complete right to revoke their authority, so far as the agency may be considered as of a private character. The rights then of prize agents, as such, extend no further than to have all their reasonable charges, disbursements, and commissions, in the first instance, paid out of the prize funds, on which they have a claim in the nature of an equitable lien.⁴ It would be a contravention of the language and the intent of the Acts of Congress, and betray an undue disregard of the interests of persons reposing equally on public and private confidence, for the court to pass by the claims of the agents, and pay into the hands of the individuals of the crew, or their private agents, the gross amount of their shares, and leave the agents to their remedy at common law for a proportional contribution from the crew. In most cases this would be but a mockery of justice.

The Prize Court, therefore, will attend to the reasonable claims of the owners and agents, and will not disturb any legal or equitable liens, to which they may be entitled. It will pursue, in this respect, the course, which the law has prescribed in the distribution to be made by the Marshal. But when it has allowed all these reasonable claims, it is not easy to perceive any reason, why it should withhold the residue from any favoured private agent, whom the

⁴ *The Franklin*, 4 Rob. 404.

party entitled to it shall select, at the peril of paying a double commission. The discretion of such an application may well be doubted, but it is a consideration, which cannot be entertained before the prize tribunal.

What I shall do at present is, to refer this application to commissioners, with directions to state the accounts of the cruise, including the charges, disbursements, advances and commissions of the general agents, so far as they may respect the petitioners before the court—and further to state the shares to which the petitioners are entitled, and the number of shares in the whole concern—and the liens or special claims, if any, which the general agents have on any shares. The commissioners are to give notice to the agents or attorneys of the parties of the times and places of their meeting, and to report their doings to the court, as soon as conveniently may be.

With respect to the six shares, which by the shipping articles were reserved to be distributed by the captain among the most deserving of the crew, he has executed his authority by dividing five shares in quarters among the crew, and awarding one whole share to himself as among the most deserving. The parties, to whom this bounty has been awarded, have now a vested interest in it, which the captain cannot vary or control. Of course, he has no right to have the proceeds paid into his hands. The share reserved by the captain for his own supposed extraordinary services must pass into the general fund, as an unappropriated sum. It can never be permitted to any person, in violation of the confidence of the owners and crew, to appropriate to himself those rewards, of which he is the mere trustee, for the exclusive benefit of others.

If any of the crew did not proceed on the cruise, under circumstances, which should exclude them from sharing,

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their shares should be deducted from the general statement.

The prize proceeds belonging to the owners, officers and crew, who have not objected, will be paid to the general agents. ⁵

⁵ A special report was afterwards made by the Commissioners, which was, after argument, confirmed by the Court, and distribution decreed accordingly.

CIRCUIT COURT OF THE UNITED STATES,

MASSACHUSETTS MAY TERM, 1814, AT BOSTON.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
 { Hon. JOHN DAVIS, District Judge.

THE INVINCIBLE—THE FRENCH CONSUL, AND HILL AND McCOBB, CLAIMANTS.

The trial of prizes belongs exclusively to the courts of the country of the captors. No neutral nation can justly interfere, or take cognisance of them, when brought into its territory, except for the purpose of ascertaining whether the vessel be lawfully commissioned, or the prize has been captured in violation of the neutral sovereignty.—And it makes no difference, whether the property be claimed as belonging to the subjects of the neutral nation, within whose territory it is brought, or to third persons. *A fortiori* no suit can be sustained in a neutral tribunal against a lawfully commissioned cruiser, which is brought within its jurisdiction, to recover damages for a supposed illegal capture. Such suit belongs exclusively to the courts of the captors, and their jurisdiction is not destroyed by the recapture of the prize supposed to be illegally captured.

The Admiralty has jurisdiction *in rem*, as well as *in personam*, in cases of maritime torts, where the thing or the person is within the territory. It may issue a foreign attachment to arrest the *choses in action* of the offending party.

What constitutes a probable cause of capture may depend on the ordinances of the country of the captors, as well as on the law of nations.

THIS was the case of a French private armed ship, duly commissioned as a cruiser, recaptured from the British, in the month of May, 1813, by an American privateer, carried into *Portland*, and proceeded against in the District Court of *Maine*, as prize of war.

Besides the claim of the French Consul in behalf of the owners, a special claim was interposed by *Hill* and *Mc'Cobb*, citizens of the *United States*, alleging that their ship, the *Mount-Hope*, with her cargo on board, was, in March, 1813, unlawfully captured on the high seas by said ship, *L'Invincible*, and carried to places unknown, whereby said ship and cargo were wholly lost to the owners; and praying, among other things, that after payment of salvage, the residue of said ship *L'Invincible* and cargo, might be condemned and sold for the payment of the damages sustained by them by reason of the premises.

By agreement of the parties, an interlocutory decree of condemnation passed, and the ship was ordered to be sold. One moiety of the proceeds was paid to the recaptors as salvage, and the remaining moiety, amounting to \$5434,50, being ordered to be brought into court to abide the decision of the several claims above mentioned, was delivered, on stipulation, to the proctor for the owners of the *Invincible*.

At September Term, 1813, *Maisonnaire* and *Derouet* of *Bayonne*, owners of the *Invincible*, by their proctor, appeared under protest in answer to the claim of *Hill* and *Mc'Cobb*, and alleged, among other things, that the *Mount-Hope* was lawfully captured, on account of having a British license on board, and other suspicious circumstances inducing a belief of British interest; and that, as the protestants believed, on the voyage to *Bayonne*, to which port she was ordered, said ship was recaptured by a British cruiser, sent into some port in *Great Britain*, and there finally restored by the Admiralty to the owners; after which she pursued her voyage, and safely arrived, with her cargo, at *Cádiz*; and thereupon they prayed that the claim might be dismissed.

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Hill and *Mc'Cobb*, in their replication, deny the legality of the capture, and the existence of a British license, on board of the *Mount-Hope*; and they allege embezzlement and plundering by the crew of the *Invincible*, admit the recapture and restoration upon payment of expenses; which, together with outfits for the voyage to *Cadix*, amounted to about \$9000; and pray that the protestants be directed to appear absolutely and without protest.

The objections to the jurisdiction having been overruled by the District Court, the owners appeared absolutely, and alleged the same matters in their defence, which were stated in their answer under protest; they also prayed the Court to assign *Hill* and *Mc'Cobb* to answer interrogatories, which was ordered by the Court. *Mc'Cobb*, who was master of the *Mount-Hope*, declined answering an interrogatory, requiring a disclosure of the fact, whether there was a British license on board, on the ground that he could not be compelled to answer any question, the answer to which might expose him to any penalty, forfeiture or punishment; and the court allowed the refusal. *Hill*, in answer to the same interrogatory, denied any knowledge of a British license.

The District Court having decreed, that *Hill* and *Mc'Cobb* should recover against the owners of the *Invincible* the sum of \$9000 damage and costs of prosecution, the owners appealed to this court, and the preliminary question of jurisdiction now came on to be argued by *Dexter* for the appellees, and *Blake*, District Attorney, for the appellants.

¹ *Blake*. Before there can be a decree for the libellants, the capture must be adjudged illegal. The question

¹ This was the first case argued after the Reporter had assumed the office. He was not present at the opening by Mr. *Blake*, nor at the commencement of Mr. *Dexter's* argument.

is therefore reduced to one merely of prize, and, by the law of nations, must be determined in a court of the captors.²

This rule of the law of nations is perfectly reasonable, and is founded on the right of the belligerent to capture the property of his enemy. The right of search is allowed as a mean of enforcing that of capture.

By capture, the thing is acquired, not to the individual, but to the state. No neutral power ought therefore to inquire into its justice or injustice.³

Another reason of the principle, that the captors are accountable only to the tribunals of their own country, is, that their country is accountable to all other states for what its citizens do in war.⁴

Dexter. It is admitted, as a general rule, that a neutral is not competent to decide between belligerents, and that the only proper court for determining the question of prize, is a court of the captors. It is also admitted, that when this jurisdiction has attached, it draws after it all questions that are merely incidental. The question of damages for an unlawful capture must, in compliance with this rule, follow the principal question, and, in the present case, would have been exclusively cognizable by the French courts, had the *Mount-Hope* been carried into a French port, and there proceeded against as prize. The allowance or refusal of damages on acquittal might perhaps, upon this supposition, have been conclusive upon every other tribunal, for the jurisdiction would have attached in the court of the

² *Glass vs. the Betsy*, 3 Dall. 6, 10, 11.—*Doug.* 571. *Chitty passim.* *United States vs. Peters*, 3 Dall. 121—128. 1 Dall. 78.

³ *Elsebe* 5, Rob. 181.—2 *Woodes.* 446.—*Vattel* 63—} 202.—*Lee*
 § 2, 238.—*Doug.* 616.—*Duke of Newcastle's letter*, 1 *Coll. Jurid.* 129.

⁴ *French Treaty*, Art. 17—2 *Ruth. Inst.* 513—594.—1 *Bl. Com.* 258.
Lee 46.—*T. Ray.* 473.—3 *Dall.* 15.

capturing power. But the *Mount-Hope* was not carried in, and as therefore the question of prize can never come before a court of *France*, neither can the question of damages be exclusively cognizable by a court of that nation.

In what court can the complainants obtain redress, if not in this? In cases of damage by running foul, and other marine accidents, the jurisdiction is not controverted. Why should not the same remedy be afforded in the present instance?—Indeed, an additional reason for the interference of the court may be found in the protection, which every government owes to its subjects. A citizen calls upon the judicial power of his country, to afford him compensation for an injury done on the high seas; the ship, which in the Admiralty is regarded as the offending thing, being already in your control by means of a prior libel.

But the complaint is not confined to the mere unlawful capture. The libel and claim allege a wanton pillage, which even in a case of capture for just cause, would not be excused. Perhaps, it might even be contended, and the principle seems to have been admitted in the Supreme Court of the *United States*, that by such misconduct the capture became unlawful *ab initio*.

The case cited from 3 *Dallas*⁵ differs essentially from the present. The principal ground of decision there was, that the corvette belonged to the *French Republick*. There was also the farther reason, that the prize being at that moment in a French court for adjudication, the jurisdiction had already attached. In the other case cited from 3 *Dallas*,⁶ the jurisdiction was sustained, and damages awarded. The other facts in the case affect rather the merits, than the question of jurisdiction. The whole case

⁵ *United States vs. Peters*, 3 *Dall.* 121.

⁶ *Talbot vs. Janson*, 3 *Dall.* 133.

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proves, that the courts of the *United States* have jurisdiction of damages for an unlawful capture on the high seas, as prize, by a vessel acting under the authority of the French government.

Blake, in reply. Even conceding what perhaps, upon the principles of the cases cited, may be doubted, that this court would have had jurisdiction, if the *Invincible* had brought her prize into the *United States* for any purpose whatever, and *Hill* and *Mc'Cobb*, finding her here, had proceeded for restitution on the ground of illegal capture, still the subject matter cannot now be within the jurisdiction of the court; for the question would be, whether the *Mount-Hope* is liable to condemnation or not, and the *Mount-Hope* is not here.

[The Court suggested, that Mr. *Dexter's* point was, that the jurisdiction attached, whenever the party, or thing, committing the offence, is in the country.]

Blake. If jurisdiction is sustained because the vessel is here, so it might be, if any other property, even bank stock, were found in the country.

It is true, that the government is bound to protect its citizens, but it is not true, that the party here would be without remedy. A libel in a court of *France* would afford complete redress, if any injury has been sustained.

It is said, that the court have to consider certain irregularities committed by the captors on board of the *Mount-Hope*. It is denied, that there were any such irregularities, and this, being a question connected with the capture, must be tried in the proper tribunal for taking cognizance of the prize.

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No distinction is made in the case in *Dallas* between public and private armed vessels. The reason that public ships are not subject to a process of this nature is, that the injury is a matter for discussion between the two governments. This reason is not less applicable to private, than to public armed ships, for they all act under public authority.

The difficulties, which would attend the trial of this question in a court of the *United States*, afford an unanswerable argument against the jurisdiction. The Courts of *France*, on the other hand, would have every fact before them. Should the trial be in this court, it ought to be conducted in the same manner, as it would have been in a French court; but this, it is well known, would be impossible.

STORY, J. after reciting the facts. It is contended on the part of the protestants, that the prize courts of the *United States* have no cognizance of captures made by a foreign power, but that the right to decide upon the legality of captures belongs exclusively to the courts of the capturing power. On the other hand, it is contended by the counsel of Messrs. *Hill* and *McCobb*, that although the general principle be admitted, that the courts of the capturing power have jurisdiction as to the legality of all captures made under its authority; yet the principle applies only where the captured property is actually brought within the jurisdiction of the capturing power, so that prize proceedings may attach upon it. That the Admiralty courts of every country have general jurisdiction in all cases of torts committed on the high seas, wherever the person or thing, by which the tort is committed, is within the territory. That in the present case, the ship *Mount-Hope* never having been carried into *France*, the prize jurisdic-

tion of its courts never attached, and therefore the present question, as to damages, could never attach, as an incident to the general jurisdiction of such courts.

The general doctrine, that the trial of prizes belongs exclusively to the courts of that state, to which the captor belongs, is now too firmly settled to admit of doubt. In the great argument respecting the Silesia loan, it is laid down, in emphatic terms, that "this is the clear law of nations, and by this method prizes have always been determined in every other maritime country of *Europe*, as well as *England*." (*Coll. Jurid.* 129.) And this right attaches, not only when the captured property is brought within the territory of the capturing power, but also when it is brought within a neutral territory. The seizure as prize vests the possession in the sovereign of the captors, and subjects the property to the jurisdiction of his courts, and that possession is deemed firm and secure in a neutral port, and cannot be lawfully divested by a neutral tribunal.⁷ And it makes no difference whether the captured property, in such case, belong to an enemy or a neutral.⁸ It would seem therefore to follow, as a necessary inference, that the courts of neutral nations were bound to abstain from the exercise of all jurisdiction over property captured as prize by a regularly commissioned foreign cruiser, and brought into their ports. But inasmuch as captures may have been made without a lawful commission, fraudulently or piratically, or in violation of the territorial rights of the country, into which the prize property is brought; for the purpose of inquiries of this kind, neutral courts may entertain ju-

⁷ *Bynk. Qu. Jur. Pub.* ch. 15 and 17. *Hudson vs. Guestier*, 4 *Cranch*, 293. *The Henrick and Maria*, 4 *Rob.* 43.

⁸ *Valin. Traité des prises*, Ch. 14. sect. 42. *Duke of Newcastle's letter*, 1 *Coll. Jurid.* 129. *U. S. vs. Peters*, 3 *Dall.* 121. *Hudson vs. Guestier*, 4 *Cranch*, 293.

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jurisdiction, and in proper cases award restitution. It seems settled, that if a capture has been made within the territorial seas of a neutral country, or by a privateer illegally equipped in a neutral country, or by persons, who could not, without a violation of their allegiance to a neutral country, act under a belligerent commission, such capture is invalid, and the property, to whomsoever belonging, may be rightfully restored by the prize courts of such neutral country, when brought within its ports.* And the principle, upon which such decisions are sustained, seems perfectly sound, and consistent with the acknowledged rights of belligerent powers. A neutral nation is bound to abstain from every act of hostility, and to conduct itself with perfect impartiality. If it suffer its neutral arm to be used, to aid one belligerent, and to oppress its own friends, it becomes a party to the war, and is justly responsible for every act of injustice or hostility, which flows from such conduct. It has a right therefore to protect its own sovereignty from violation, and to punish the offenders; and, as far as is in its power, to restore the parties injured by the illegal act to the same situation, in which they were before it was committed.

So far then, as the sovereignty and rights of neutral nations are concerned, they form an exception to the general doctrine, as to the exclusive jurisdiction of the courts of the capturing power over prizes.

The exception seems indeed to have been pressed somewhat farther in some decisions in our own country; farther indeed than in my humble judgment, and I speak with the utmost deference, can be easily reconciled with general principles. It seems to have been held, that whenever neutral or American property is captured on the high seas

* *Talbot vs. Janson*, 3 *Dall.* 133.

by a lawfully commissioned ship of a foreign belligerent, and brought into our ports, the courts of the *United States* have jurisdiction to inquire into the merits of the capture; and, if in their judgment the captors are not entitled to condemnation, to award restitution, notwithstanding even a probable cause for the capture." In time of war, it is an unquestionable right of the belligerents to search neutral ships and cargoes upon the ocean, and, in cases of suspicion, to send them in for adjudication. The evidence to acquit or condemn comes in the first instance from the ship's papers, and the persons on board. If a breach of neutrality, or fraud, or gross misconduct appear, the courts of prize are competent in such cases to decree confiscation of the property by way of penalty. If therefore a neutral tribunal shall undertake to try these questions, which regularly belong to the courts of the belligerent; there is certainly some danger, that the case will not always be tried by the same proceedings and rules, which ordinarily govern in prize causes. In cases of capture of enemy's property, strictly so called, under like circumstances, the exercise of such a jurisdiction would be utterly inconsistent with the admitted exclusive rights of the captors, for no neutral country can interpose to wrest from a belligerent prizes lawfully taken; ¹⁰ and as all neutral property, when captured, is, if condemned, deemed *quasi* enemies' property, the neutral tribunal does in fact undertake to decide on the title to the captured property, and settle its hostile or innocent character. If the property turn out to be hostile, it will not undertake to condemn it, for that would be a voluntary interposition in the war; if neutral, it seems difficult to perceive, how it can rightful-

¹⁰ *Glass vs. the Betsey*, 3 Dall. 6.—*Del Col vs. Arnold*, 3 Dall. 333.

¹¹ 1 *Rob. Rep.* 65.

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ly settle the question, how far its character of neutrality has been compromised, or injuriously used against the belligerents.

It is true, that by the ordinance of *Lenis XIV.* (*des prises*, Art. 15,) it is expressly declared, that if, on board of prizes brought into French ports by foreign armed vessels, there shall be found goods belonging to the subjects of France, or its allies, the goods so belonging to French subjects shall be restored. *Valin* says, that this right is exercised in favour of subjects by way of compensation for the asylum granted to the captor and his prize; but he expressly states, that the rule does not extend to the goods of allies.¹² At best, this is but a mere municipal regulation of France, and in countries, where no similar regulation exists, it should seem fit, that the general rule of the law of nations should prevail. The true principle seems laid down by Mr. Justice Johnson in his very able opinion in *Rose vs. Himely*.¹³ "A prize, brought into our ports by a belligerent, continues subject to the jurisdiction of the capturing power, although the *corpus* be within the limits of another jurisdiction. A prize, brought into our ports, would be in no wise subjected by that circumstance to our jurisdiction, except perhaps in the single case of its being necessary to assume the jurisdiction, to protect our neutrality or sovereignty, as in the case of captures within our jurisdictional limits, or by vessels fitted out in our ports." In the *Flad Oyen*,¹⁴ Sir William Scott asserts the same doctrine, and declares, that prize of war is a matter "over which a neutral country has no cognizance whatsoever, except in the single case of an infringement of its own territory."

¹² 2 *Valin*, Comm. 274. *Valin des prises*, ch. 7, p. 106.

¹³ 4 *Cranch*, Appendix. Note (C.)

¹⁴ 1 *Rob.* 134, 144.

The doctrine, which seems asserted in the cases of *Glass vs. the Betsy*, and *Del Col vs. Arnold*, so far as applies to the present discussion, is encountered also, and in no small degree shaken, by the opinion of the Supreme Court in *Hudson vs. Guestier*.¹⁵ The Chief Justice, in delivering the opinion of the court, speaking of a vessel captured as prize, says, "in the port of a neutral, she is in a place of safety, and the possession of the captor cannot be lawfully divested, because the neutral sovereign, by himself or his courts, can take no cognizance of the question of prize or no prize. In such case, the neutral sovereign cannot wrest from the possession of the captor a prize of war brought into his ports." And, applying the same reasoning to the case of a seizure for the violation of a municipal law, he declares it to be the opinion of the court, "that a possession, thus lawfully acquired under the authority of a sovereign state, could not be divested by the tribunals of that country, into whose ports the captured vessel was brought." It will be recollected, that in this case the property belonged to American citizens, and had been condemned, while lying in a Spanish port, by a French tribunal, and afterwards brought to this country. But in *Rose vs. Himself*,¹⁶ which was argued at the same time, and involved in many respects the same questions as *Hudson vs. Guestier*, the property was actually brought into the *United States*, and libelled for restitution, before any proceedings were instituted in any French tribunal. The doctrine therefore in *Hudson vs. Guestier* must be supposed to apply to the case of American, as well as neutral, property, captured and brought into an American port. In either respect it would be inconsistent with that, which seems to be assumed in the cases in 3 *Dallas*, 6 and 333, to which I have alluded.

¹⁵ 4 *Cranch*, 293.¹⁶ 4 *Cranch*, 241.

But allowing these cases to have the fullest effect, which the most liberal construction can impute to them, they only decide, that the jurisdiction of our courts, in matters of prizes made by foreign cruisers, attaches, whenever the prize property is within our own ports. In the case before the Court, the cruiser itself only is within the country, and not the captured ship in the character of prize. It is therefore clearly distinguishable. The cruiser too comes into port by compulsion in the hands of American recaptors, succeeding to hostile captors. It is not therefore a case, where even a voluntary *asylum* is sought.

I accede to the position, that, in general, in cases of maritime torts, a court of Admiralty will sustain jurisdiction, where either the person, or his property, is within the territory. It is not even confined to the mere offending thing; it spreads its arms over the tangible, as well as incorporeal property, of the offending party, to enable it to afford an adequate remedy. The Admiralty may therefore arrest the person, or the property, or, by a foreign attachment, the *choses in action*, of the offending party, to answer *ex delicto*. But it affords such remedies only, where the tort is a mere marine trespass, and not where it involves directly the question of prize.

No case has been produced at the argument, where a neutral tribunal has sustained jurisdiction over a cruiser on account of her having made illegal prizes on the high seas, where the prize was not within its territory. After considerable research, I have not been able to find any such case in modern times. From the works of Sir *Leoline Jenkins* (2 vol. 714—754) it does however appear, that in 1675, the English Admiralty confiscated a French privateer on account of illegal depredations committed on English and Dutch vessels, against the re-

monstrances of the French government, who claimed a *renvoy* of the cause, as rightfully belonging to them. But the particular ground of the decision does not appear; and as one charge was for an infringement of the territorial sovereignty of *Great Britain*, it might have turned upon that point. ¹⁷

On the other hand, in the case of the *United States vs. Richard Peters*,¹⁸ the Supreme Court awarded a prohibition to the District Court against proceeding on a libel against a French national ship of war for an alleged illegal capture of an American schooner and cargo, the prize having been carried into a French port for adjudication. And the prohibition asserted, that by the law of nations belligerent cruisers duly commissioned had a right, in time of war, to arrest and seize neutral ships, and carry them into the ports of their sovereign for adjudication, and that such cruisers, or their officers and crew, were not amenable before the tribunals of neutral powers for their conduct therein.

It is argued, that this case is inapplicable to that at bar, because the *Mount-Hope* was recaptured, and thereby the right of the French captors devested, and their courts ousted of jurisdiction. And it is certainly law, that in case of a recapture, escape or voluntary discharge, of a captured vessel, the right of the courts of the belligerent to adjudicate upon the property, as prize, is completely gone; for that right remains, only while the possession of the property remains, either actually or constructively, in the sovereign of the captors. But it does not thence follow, that such courts are deprived of the authority to award damages to the injured party, where the capture has been unlawful, and thereby indirectly to entertain the question of prize. Much less is it to be inferred, that the fact of

¹⁷ 2 Wood 425.

¹⁸ 3 Dall. 121.

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recapture alone enables a neutral tribunal to take cognizance of the capture itself, and thereby of the question of prize, over which originally it could not assert any jurisdiction.

In the first place, it is extremely clear, that the French courts had complete authority, as courts of prize, to award damages for the capture of the *Mount-Hope*, if it was illegal. The ordinary mode of seeking redress by neutrals for such injuries is, to apply to the prize tribunals of the sovereign, under whose authority the capture has been made, for damages. Such cases are familiar in the annals of the admiralty.¹⁰ The argument therefore of the counsel for Messrs. *Hill* and *Mc'Cobb*, that, if this court have not jurisdiction to award damages, no court has, and there is a right without a remedy, cannot be sustained.

In the next place, the principal question, involved in a trial under such circumstances, necessarily is the question of prize. It is true, that probable cause would justify the seizure, and destroy the claim for damages; but it must be probable cause to seize as prize in reference to a violation of belligerent rights. What constitutes such probable cause depends on the state of the war, the actual operations of the belligerents, the documents required to be on board, the artificial rules applied by prize tribunals, to sift the colourable papers and commerce of neutrals, and the positive directions of the sovereign power. Of some of these questions, at least, the courts of the captors are the most competent judges. Suppose an American ship had been captured under the British orders in Council for having a certificate of origin on board, would it have been competent for an American tribunal, if the cruiser had come within our ports, to decide upon the legality

¹⁰ *The Betsey*, 1 Rob. 93.

of the capture thus made under the orders of the sovereign, who had already declared such certificates to be a good cause of condemnation?—It seems to me difficult to maintain, that such a capture, so made, could, in an American court, subject the party to damages, even supposing it be a clear infringement of our neutral rights, and of the laws of nations. The acts done under the authority of one sovereign can never be subject to the revision of the tribunals of another sovereign; and the parties to such acts are not responsible therefor in their private capacities. If the citizens of a neutral country are injured by such acts, it belongs to their own government to apply for redress, and not for judicial tribunals to administer it. One great object in the establishment of prize courts is to ascertain, whether a capture is made under the authority of the sovereign power. When once the courts of any sovereign have definitively pronounced the capture rightful, it becomes the acknowledged act of the sovereign himself, and the parties, who made the capture, are completely, as to all foreign nations, justified, however repugnant such capture may seem to the law of nations. How can a neutral tribunal decide, that a capture on the high seas is in opposition to the will of the sovereign of the captors?—It may perhaps be competent to decide, that the capture ought not to have been ratified, but could it hence infer, that it would not be?

Whether damages then shall in any case of capture be given, must depend upon the law of prize, as understood and administered by the foreign sovereign, or in a case of probable cause, upon the subsequent conduct of the captors. The damages therefore are not an independent and principal inquiry, but a regular incident to the question of prize, in whatever manner the process may be instituted. And this consideration disposes of that part of the argu-

Gammell vs. Skinner.

ment, in which it is assumed, that although a neutral tribunal may not directly entertain the question of prize, yet it may collaterally, when it is a mere incident to the question of damages.

On the whole I am of opinion, that in the case before the Court, the prize tribunals of *France* had complete jurisdiction by the capture; that, although the right to adjudicate as prize was devested by the subsequent British recapture, yet it was still competent for them to entertain a suit by the owners for damages, if the capture were illegal; that, consistently with the law of nations, an American tribunal could not adjudge on the question of prize; and the recapture of the prize, or the bringing the cruiser within our ports, did not vest a jurisdiction in such tribunal, which it was otherwise incapable of assuming.

I am therefore for sustaining the plea to the jurisdiction, and for dismissing the claim of Messrs. *Hill* and *Mc'Cobb* with costs.

DAVIS, District Judge, concurred.

*Claim dismissed with costs.**

* Upon appeal this judgment was affirmed by the Supreme Court.
1 *Wheaton's R.* 238.

GAMMELL vs. SKINNER.

In causes on the instance side of the Admiralty, the answer of the claimant should be verified by oath; and in a suit for wages, the libellant may compel the adverse party to answer special interrogatories.

In suits for wages, interest is allowed from the time of a demand proved; and if no demand is proved, from the commencement of the suit.

THIS was a libel for mariners' wages. Some questions arose as to the practice in causes on the instance side of the court, and particularly in causes of this nature.

STORY, J. In causes on the instance side of the Court, the answer of the claimant should be verified by his oath. This is the general practice both of courts of equity and courts of admiralty; and indeed of all courts proceeding according to the course of the civil law.¹ In suits for mariners' wages, the libellant may compel the adverse party to answer special interrogatories, which are filed under the direction of the court, and are like the interrogating part of a bill in Chancery.—And in point of convenience this practice should be adhered to, for it brings distinctly before the court the points, on which the defence is intended to be rested.—As to all facts denied, the burthen of proof lies on the plaintiff, except in the special case of the shipping paper and logbook, as provided for in the statute regulating seamen in the merchants' service.²

Selfridge, for the libellant, inquired, whether interest would be allowed on the amount of the wages due from the time of a demand made.

STORY, J. There is no difference in this respect between the practice of our courts of common law, and that of the Admiralty. In the latter, interest is generally allowed from the time of a demand made for the wages; and if no special demand is proved, from the time of the commencement of the suit.

Townsend, for the defendant.

¹ 2 Bro. Adm. 416.—Clerk. Prax. tit. 14, 24.—Marriot's Forms, 363.

² Act 20 July 1790, ch. 28—s. 6.

THE RESOLUTION AND CARGO, BACON CLAIMANT.

If a vessel licensed for the coasting trade engage in smuggling foreign goods, she is forfeited under the thirty-second section of the coasting act of Feb. 18, 1793, chap. 8.

THIS was the case of a vessel licensed for the coasting trade, and seized for an alleged forfeiture. The information contained three counts; the first, for an illegal taking on board of prohibited goods with intent to import the same into the *United States*, contrary to the sixth section of the non-importation act of March 1, 1809, chap. 91: the second, for unlading goods to the value of \$400 and upwards in the night time without a special license, contrary to the fiftieth section of the collection act of March 2, 1799, chap. 128: the third for being concerned in a trade other than that, for which the schooner was licensed, contrary to the thirty-second section of the coasting act of February 18, 1793, chap. 8.

STORY, J. I will not take up time in considering the evidence in this case. There is the most plenary proof, that the vessel was engaged in a smuggling trade under circumstances admitting of no apology; and there is no doubt that the goods were of British manufacture, and greatly exceeded the value of \$400.

I do not think it material to consider, how far, in point of fact, the allegations of the first and second counts are supported, because, in my judgment, the decision of this cause may well rest on the third count.

It is contended, that the vessel being duly licensed for the coasting trade, a traffick in smuggled goods is not within the thirty-second section of the coasting act. This

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argument is utterly untenable. A vessel licensed for the coasting trade cannot, without manifest absurdity, be supposed to be authorized thereby to carry on an illegal traffick. Such a construction would overturn the whole revenue system, and license every species of fraud.

It is very clear, that a coasting vessel engaged in an illegal traffick, is employed in a trade, other than that, for which she is licensed, and consequently liable to condemnation.

I affirm the decree of the District Court with costs.

G. Blake, District Attorney, for the *United States*.

J. E. Smith, for the claimant.

THE HOPE, RITCHIE AND CARSON CLAIMANTS.

The master of a ship is not a competent witness in an information *in rem* for a forfeiture occasioned by his misconduct.—Circumstances of presumption of masters' knowledge of illegal goods being on board.

STORY, J. The schooner *Hope* has been seized, as forfeited for a violation of the sixth section of the non-importation act of March 1, 1809, chap. 91. From the evidence it appears, that in the latter part of the year 1812, the schooner was captured on a voyage to *Spain*, carried into *England* for adjudication, and there finally restored. She afterwards sailed from *England*, apparently without any cargo, having passengers on board, who had been prisoners of war, and arrived at *Boston* in August 1813. On her arrival, she was reported as in ballast, and her manifest contained no statement of any British merchandise being on board.—On search, however, in the cabin, under

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the births of the master and mate, divers goods of British manufacture were found concealed, which were seized, and, no claim having been interposed therefor, the same have since been condemned and sold for about \$1890. At the time of the seizure, some of these goods were claimed by the master as his own property, and some as the property of the mate and passengers.—The goods claimed by the master were found in the same places, where the others were concealed, and the rule must apply, *noscitur a sociis*. It is an almost necessary presumption, that the master knew, where his own goods were ; and if so, it is extremely difficult to suppose him ignorant of the concealment of the other packages. It was his duty to exercise every diligence, in order to avoid involving the ship in the severe penalties imposed by law upon illegal importations. If these goods had been concealed in unusual places, to which the master might not be supposed to have had ordinary access, there might be some colour for asserting his ignorance of the contents of the other packages.—But here the very goods claimed by himself have been abandoned on account of their illegal character, and the other packages must, in a mind not wilfully blind, have attracted the strongest suspicions. The master had a right to know their contents, and being put upon inquiry by circumstances calling loudly for it, I must presume that he had full knowledge of the illegal character of the packages, and meant to take upon himself the peril of detection.

I regret, that I cannot see this case in the same favourable light, as the District Court. The owners of the schooner do not appear to have had the slightest connexion with this illegal traffick : and it is unpleasant to visit upon them the penal consequences of acts, in which they took no part. But I cannot bend the rules of law to cases

of individual hardship. My duty leads me through a harsh and narrow path; but I have the consolation to know, that another avenue is open to a department, which has the power to temper the severity of the law, and yield relief to innocent sufferers.

It has been intimated, that if the court should be of opinion, that the master is a competent witness, and would indulge the parties with an opportunity, his testimony could be procured, to prove his ignorance of the illegal merchandise being on board. But even if competent, I cannot say, that the naked denial of the master, standing (as it should seem) *in vinculis*, could outweigh the other strong circumstances of the case. How could the master be believed, if he should deny his knowledge of his own adventure? I am, however, of opinion, that in this case the master is not a competent witness. He is called to exempt the ship from a forfeiture, occasioned by his own illegal conduct. He has therefore a direct interest in the event of the suit; and the decree of condemnation would be good evidence in a suit brought against him by his owners. The better opinion in the authorities, in my judgment, supports this doctrine.¹

I reverse the decree of the District Court, and adjudge the schooner *Hope* and appurtenances to remain forfeited to the *United States*.

G. Blake, for the *United States*.

E. Rockwood, for claimants.

¹ *Fuller vs. Jackson*, *Bunb. R.* 139. *Spong vs. Fasting*, *Bunb. R.* 203. Vide also *Green vs. New River Company*, 4. *T. R.* 589. *Thompson vs. Bird*, 1 *Esp. R.* 339. *Reillon vs. Sandforth*, *Bunb. R.* 139, note.

ODIOME vs. WINKLEY.

A witness cannot be asked a collateral question not relevant to the matter in issue, barely to test his credibility.

The original inventor is, at all events, entitled to the patent for his invention. If a person invent an improvement only on a machine, he is not entitled to a patent of the whole machine.

The identity or diversity of two machines depends, not on the employment of the same elements or powers of mechanics, but upon the producing of the given effect by the same mode of operation, or the same combination of powers.

CASE for infringement of a patent right of one *Jesse Reed* for cutting and heading nails at one operation. The plaintiff claimed as assignee of said *Reed*.

At the trial, the plaintiff produced and proved the patent of said *Reed*, dated the 22d of February 1807, and an assignment to himself of the whole of *Reed's* patent right. He also proved, that the machine was a highly useful invention, and that the defendant used two machines, which, in the opinion of the plaintiff's witnesses, cut and headed nails at one operation, substantially upon the same principles, and by the same mode of operation, as the plaintiff's machines, though there were some differences in the structure and operations of some particular parts. The plaintiff also gave evidence of the value of the use of the machines, so used by the defendant, during the time stated in the declaration, and claimed damages to the amount of the value so proved.

The defendant, in his defence, relied on three points.—

1. That the machines used by him were not substantially, in principles and mode of operation, like the plaintiff's.—
2. That if they were, still that the plaintiff ought not to recover, because the machines so used by him were the invention of one *Jacob Perkins*, under whom he claimed, who had invented, used and patented the same, long before the

invention and patent of the said *Jesse Reed* ; that *Reed's* patent was too broad, it including *Perkins's* invention aforesaid, upon which invention *Reed* had made some improvements, but could not thereby entitle himself to a patent for more than his improvement.—3. That *Reed* had surreptitiously obtained his patent for the discovery of another man, to wit, of *Jacob Perkins*. The defendant filed a specification of special matter to be given in evidence under the general issue.

The defendant then produced and proved a patent to *Jacob Perkins*, dated the 14th of February 1799, and models were introduced, and exhibited to the jury, of *Reed's* machine, and *Perkins's* machine—and a number of witnesses were examined by each party, to prove the identity or diversity of the two machines, in all substantial respects, in their principles and modes of operation.

One of the defendant's witnesses, *Allan Pollock*, having been examined, and having testified, that in his judgment the principles and modes of operation of both machines were substantially the same, and having, with reference to the models before him, explained his reasons for his opinion, and described the powers, principles and adjustments of both machines, the counsel for the plaintiff produced the model of another nail machine, invented and used by a third person, *under whom neither party claimed*, long before the machine either of *Reed* or of *Perkins* existed, and proposed to interrogate the witness, as to the principles and mode of operation of said machine, and how far it coincided with, or differed from *Perkins's* machine ; in order, as the counsel stated, to shew by his answers, and by other testimony, the incorrectness of the witness in his preceding examination, and in his knowledge of mechanics, and to enable the jury the more fully to estimate the testi-

mony of the witness. This was objected to on the part of the defendant's counsel.

STORY, J. I am of opinion, that it is an improper inquiry, and overrule it. It can at best amount to no more, than going into collateral inquiries, not relevant to the matter in issue, barely to prove a witness to be incorrect. And I hold it a clear rule of law, that a witness cannot be asked, as to a mere collateral fact, having no relevancy to the issue, in order to draw from him an answer, which might, by other evidence, be shewn incorrect, and thereby to discredit him. Besides, if the inquiry were gone into, it would embarrass the jury, by drawing their attention to the principles of a machine not in controversy before the court, and, whichever way the question as to such machine might be settled, it could have no legal tendency to prove the identity or diversity of the two machines in controversy.

After the testimony was closed on each side, **STORY, J.** directed the jury, to the following effect :—

The first question for consideration is, whether the machines used by the defendant are substantially, in their principles and mode of operation, like the plaintiff's machines. If so, it was an infringement of the plaintiff's patent to use them, unless some of the other matters offered in the defence are proved. Mere colourable alterations of a machine are not sufficient to protect the defendant.

The original inventor of a machine is exclusively entitled to a patent for it. If another person invent an improvement on such machine, he can entitle himself to a patent for such improvement only, and does not thereby acquire a right to patent and use the original machine ; and if he

does procure a patent for the whole of such a machine with the improvement, and not for the improvement only, his patent is too broad, and therefore void. It is often a point of intrinsic difficulty to decide, whether one machine operate upon the same principles as another. In the present improved state of mechanics, the same elements of motion, and the same powers, must be employed in almost all machines. The lever, the wheel, and the screw, are powers well known; and if no person could be entitled to a patent, who used them in his machine, it would be in vain to seek for a patent. The material question; therefore, is not whether the same elements of motion, or the same component parts are used, but whether the given effect is produced substantially by the same mode of operation, and the same combination of powers, in both machines. Mere colourable differences, or slight improvements, cannot shake the right of the original inventor. To illustrate these positions; suppose a watch was first invented by a person, so as to mark the *hours* only, and another person added the work to mark the minutes, and a third the seconds; each of them using the same combinations and mode of operations, to mark the hours, as the first. In such a case, the inventor of the second hand could not have entitled himself to a patent embracing the inventions of the other parties. Each inventor would undoubtedly be entitled to his own invention and no more. In the machines before the court, there are three great stages in the operations, each producing a given and distinct effect;—1. The cutting of the iron for the nail;—2. The gripping of the nail;—3. The heading of the nail. If one person had invented the cutting, a second the gripping, and a third the heading, it is clear, that neither could entitle himself to a patent for the whole of a machine, which embraced the inventions of the other two, and, by the same mode of operation, produc-

ed the same effect ; and, if he did, his patent would be void. Some machines are too simple to be thus separately considered ; others again are so complex, as to be invented by a succession of improvements, each added to the other. And, on the whole, in the present case, the question for the jury is, whether, taking *Reed's* machine, and *Perkins's* machine together, and considering them with their various combinations, they are machines constructed substantially upon the same principles, and upon the same mode of operation. If they are, then *Reed's* patent is void, and the plaintiff is not entitled to recover ; and the finding of the jury upon the first special point stated in the defendant's specification of defence must essentially depend upon their decision upon this question.

As to the question, whether the patent was surreptitiously obtained, there is no direct or positive proof, that *Reed* had ever seen *Perkins's* machine before he obtained a patent, but there is evidence, from which the jury may legally infer the fact, if they believe that evidence. It is a presumption of law, that when a patent has been obtained, and the specifications and drawings recorded in the patent office, every man, who subsequently takes out a patent for a similar machine, has a knowledge of the preceding patent. As in Chancery it is a maxim, that every man is presumed to have notice of any fact, upon which he is put upon inquiry by documents within his possession, if such fact could, by ordinary diligence, be discovered upon such inquiry. It is also a presumption of fact, that every man, having within his power the exact means of information, and desirous of securing to himself the benefit of a patent, will ascertain for his own interest, whether any one on the public records has acquired a prior right.

The jury will judge, under all the circumstances of this case, whether either or any of the points of defence are sus-

Ex parte, Giddings.

tained by the evidence; and if so, they will find their verdict accordingly. If they find a verdict for the plaintiff, the court will treble the damages.

Verdict for the defendant.

A motion for a new trial was afterwards made and abandoned, and judgment was entered upon the records of a *vacatur* of the patent.

Fairbanks and B. Whitman, for the plaintiff.

Selfridge and Prescott, for the defendant.

EX PARTE, GIDDINGS.

If a mariner ship for a cruise on board of a privateer, and afterwards, before the departure from port on the cruise, he is disabled from duty, and leaves the privateer by common consent, he is not entitled to share in the prizes made during the cruise—*Aliter*, if the disability occurred during the cruise.

In this case a petition was filed by *John E. Giddings*, praying to be allowed a seaman's full share of the prizes made by the privateer *America*, *John Kehew* commander, during her cruise, the proceeds of which prizes remained in the court for distribution.

From the allegations and testimony in the case it appeared, that *Giddings* shipped as a seaman on board the ship *America*, in March 1813, for a four months' cruise. That he went on board the ship and did duty, but before the cruise was actually begun, and while the ship lay in *Salem* harbour, in the course of his duties on board, he froze both his hands, by which accident he was wholly disabled from going on the cruise, and with the consent of all parties immediately left the ship.

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Putnam, for the petitioner, contended, that the enterprise had commenced, and that *Giddings*, having been, without his default, prevented from proceeding on the cruise, was, by the ordinary rules of maritime law in regard to wages, entitled to a full share of the prize money.

Pitman, *contra*, admitted, that had the petitioner been on board after the commencement of the cruise, and been permitted or compelled to go, and to remain on shore, he would have been entitled ; but he contended, that the cruise had not commenced, when the petitioner left the ship.

STORY, J. after briefly reciting the facts. The general question upon these facts is, whether a seaman, who has shipped for a cruise, and before the departure of the privateer from the port of equipment becomes disabled from proceeding on the cruise by inevitable accident, is entitled to share in the prizes taken during the cruise.

No authority has been produced to support the claim, and, at the argument, it was mainly rested on the general position, that the contract is not divisible, and that the performance having been prevented by inevitable casualty, the party is entitled to the benefit of the maxim, that the act of Providence does not in law prejudice any man's right.

If the disability had occurred during the cruise, and the party had remained on board, or had been landed at any intermediate port, there would have been little difficulty in applying the maxim in his favour. By the settled law of the Admiralty, a seaman, disabled on board a merchant ship, would, under like circumstances, have been entitled to his full wages for the whole voyage.¹ Upon principle, there does not seem any substantial reason for a different rule in

¹ *Chandler vs. Grises*, 2 H. B. 406.

the case of a seaman hired for a cruise on board of an armed ship. And this doctrine of the Admiralty seems conformable to the maritime law of the most enlightened nations.²

There is, however, an obvious distinction between the case of a disability, before and after the voyage is begun. The great object of the contract is to perform the voyage; and the labour done in port is considered as merely auxiliary to the enterprise. If a disability then happen before the voyage is begun, all that equity seems to require is, that the mariner should be paid a reasonable sum for services actually rendered. In cases where the mariner is wrongfully dismissed before the voyage is begun, there may be perfect justice in deciding in conformity with the rule of the *Consolato del Mare*, (ch. 124,) and of *Roccus* (*de Nav. et Nau. n. 43*,) that the wages shall be paid in the same manner, as if he had performed the whole voyage; yet, in a similar case, the ordinances of the *Hanse Towns*, (*Art. 41*.) and of *France* (*Lib. 3, Tit. 4, Art. 10*.) give the Mariner only one third part, and the Ordinance of *Wisbuy*, (*Art. 3*.) one half part, of his wages, although, in case of dismissal after the voyage is begun, the whole wages are allowed.³ And I take the settled rule in England to be, that if, after the seamen are hired, the voyage is broken up, or they are wrongfully dismissed before the voyage is begun, they are entitled to their wages during the time of their retainer, and if they have sustained any special damage, to a reasonable compensation for that also. But, if the seamen are wrongfully dismissed after the voyage is

² See *Laws of Oleron*, *Art. 7*—of *Wisbuy*, *Art. 19*, and of the *Hanse Towns*, *Art. 45*.—*Cleirac Us. et Cout.* 17, 84, 104.—*Ord. de la Mar. Lib. 3 Tit. 4, Art. 11 and 13*.—1 *Valin*, 721, 746.—*Kurick, Jus. Mar. Hans. tit. 14. Art. 2*, p. 878.

³ *Cleirac, Us. et Cout. Oler. l. 5*—§ 19.

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begun, they are entitled to their wages for the whole voyage.⁴

If, in a case of a wrongful dismissal, so striking a distinction is made between the occurrence before and after the voyage is begun, it should seem, that upon principle it ought to prevail, where the dismissal has been by consent, and without the fault of either party. Under such circumstances the casualty ought not to be applied to the injury of either party.

The *Consolato del Mare* (ch. 124) provides, that if a mariner shall have laboured three days, and shall fall sick, the master of the ship shall pay half of the hire or wages (*del salario*,) and if he is found in a situation not to go on board of the ship, to the knowledge of the other mariners, the master may leave him; and the same is ordered to be done, if the mariner falls sick in foreign parts.

There is nothing in this regulation so intrinsically equitable, that it ought to be adopted as a general rule of law, and I have not been able to find, that it is incorporated into the maritime code of any country. Neither *Cleirac*, nor *Valin*, nor *Casaregis* speak of it, as such, in commenting upon articles *in pari materiâ* in the respective codes under their consideration.⁵

On the whole, I am of opinion, that the disability having occurred before the cruise had begun, the petitioner cannot, under the circumstances, be entitled to share in the prizes taken during the cruise, in the capture of which he neither actively nor constructively assisted. If it had been necessary in this case to resort to other grounds, I

⁴ *Wells vs. Osman*, 2 *Ld. Ray.* 1044.—*Abbott on Ship.* part 4, ch. 2, s. 1 and 5.—2 *Brown's Adm. Law*, 533.—*Robinet vs. Ship Exeter*, 2 *Rob.* 261.—*The Beaver*, 3 *Rob.* 92.—*Hulle vs. Heightman*, 2 *East.* 145.

⁵ See *Cleirac*, *Jugemens d'Oleron*—sec. 7. p. 17. *Casaregis*, *Spiegazione del Consolato* p. 116. ch. 124.—1 *Valin*, *Comm.* 74, Art. 11.

should have thought, that having voluntarily gone on shore, with the consent of all parties, from inability to perform the cruise, it ought to be deemed a voluntary abandonment of the contract of shipment.

In this opinion the District Judge concurs, and therefore the claim must be dismissed.

~~THE~~

THE HIRAM AND THE HERO.

Of the rule for apportionment of costs among the several claimants in prize causes.

SOME inquiries were made at the bar respecting the apportionment of costs in these cases, which were prize causes, among the several claimants of the ship and cargo.

STORY, J. In taxing the costs in prize causes, where there are several claims, some of which are disposed of by a final decree of condemnation, while others stand suspended upon appeal, the practice has been to tax the costs and expenses, which have accrued *specialty* upon each claim so finally disposed of, as a separate charge against the same, and to add thereto an average proportion of the general costs and expenses, which have accrued in reference to all the claims in the cause. In this manner all parties are made to bear a reasonable proportion of all charges, according to the final event of their particular claims.

Kleine vs. Catara.

KLEINE vs. CATARA.

In awards, the judgment of the arbitrators, or referees, is conclusive upon all matters of fact. If, however, there be a mistake of fact (as in calculation) apparent upon the face of the award, or if the referees are satisfied of a mistake of fact, though not apparent on the face of the award, and certify their wish to correct it, the award will be *recommitted* to rectify the mistake. But such a mistake is no ground to *set aside* an award.

Referees are judges, as well of the law as of the fact. If no reservation is made in the submission, the parties are presumed to agree, that every thing, both as to law and fact, necessary for the decision, is included in the authority of the referees. Under a general submission, therefore, the referees have rightfully a power to decide on the law, and on the fact. Under such a submission, the referees are not bound to award on dry principles of law, but they may award according to equity and good conscience.

If referees refer a point of law to the court by spreading it on the award, and mistake the law, the award will be set aside. If they admit the law, but decide contrary thereto upon principles of equity and good conscience, although such intent appear on the face of the award, it is no ground to set it aside.

If they make a *general* award, it cannot be impeached *collaterally*, or by evidence *aliunde*, for mistake of law or of fact, for the judgment of the referees is conclusive in both respects, unless there be fraud or misbehaviour.

If in a charter party, there be a covenant to proceed to a foreign port, and take in a cargo there on account of the charterer, and return therewith to the *United States*, for a stipulated hire, and the ship go to the foreign port, and the charterer declines to put any cargo on board, the owner of the ship is not bound to come home empty, but may engage in another voyage, and take another cargo for the *United States*, on freight, and the freight so earned cannot be claimed by the charterer.

Where the whole consideration for any stipulation fails, or it becomes incapable of being performed substantially as the parties intended, by the voluntary act of one of the parties, the other is not bound to proceed, but may decline a performance on his part.

If, by the terms of the charter party, the ship is to be navigated at the charge and expense of the owner, and especially if the whole tonnage of the ship is not let to hire, the charterer is not owner for the voyage.

If the submission be general, and the award be of a particular thing, it will be presumed that nothing else was in controversy, unless the contrary should appear. In the latter case, the award will be recommitted to the referees.

THE material facts in this case were as follows:—*Catara* was owner of the Greek ship *Jerusalem*, which arrived at *New York* with a cargo of wine. On the 16th of May,

1813, a charter party was entered into between the plaintiff, and the master of the ship on behalf of *Catara*, whereby the whole tonnage of the hold and between decks of the ship was let to the plaintiff from the port of *Havanna* to *New York*, or, in case of a blockade of that port, to *Fairfield* in *Connecticut*. It was farther agreed, that the ship should sail from *New York* to *Havanna*, with so much of the imported cargo of wine, as the owner, *Catara*, should think proper to export for his sole account and risk; the wine to be consigned to the order of the plaintiff there, to be sold for account of *Catara*, and the proceeds to be vested in sugars to be laden on board of the ship, on the return voyage, for the same account and risk. The remainder of the ship's hold and between decks to be entirely loaded by the agent of the plaintiff, at the rate of one dollar per quintal of 112 lbs. net weight, for sugars, and every other produce, with 2 1-2 per cent. primeage, payable on the delivery of the cargo at the port of destination in the *United States*. It was farther agreed, that that part of the return cargo, belonging to the owner of the ship, should be consigned to the plaintiff, and that the plaintiff might deduct from the proceeds of the sales thereof, and from the freight due on the return voyage, all sums paid by him for advances, insurances, &c. on account of the owner of the ship, with interest; and that, if any part of the wine should remain behind unsold at *Havanna*, the net proceeds should be remitted to the plaintiff by some other vessel. The plaintiff farther agreed, in case the wine should not sell immediately on its arrival, to cause to be advanced to *Catara*, two thirds of the reputed value thereof in *Havanna*, in sugars, at the market price, after deduction of charges; which sugars were to be laden on board of the ship on account of the owner, and to be consigned to the plaintiff, and the plaintiff was to receive, on all sales of the return

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cargo, six per cent. commission. The plaintiff farther agreed to effect insurance on the voyage according to the instructions of *Catara*, and the policies were to remain in his hands, as collateral security for advances made to *Catara*. And the master, in behalf of *Catara*, farther agreed to victual, man, equip and navigate, the ship, &c. during the voyage, at the cost and charge of the owner.

In pursuance of this charter party, the ship sailed on the voyage to *Havanna*, and safely arrived there. The plaintiff gave written directions to *Drake*, his supposed agent there, to comply with the stipulations of the charter party. *Drake*, however, upon application to him, disavowed the agency, and refused to make any advance on the wine, or to put any cargo on board, as the plaintiff's agent, for the return voyage. By a new agreement, however, a return cargo was put on board by *Drake*, on the account and risk of, and with a consignment to, strangers to the charter party, and with this cargo the ship sailed for the *United States*, was captured on the voyage, carried into *Halifax*, and, after being restored on payment of expenses, finally arrived at *Boston*, where the cargo was discharged. The freight of the return cargo amounted to about \$5000 more than that stipulated in the charter party.

The action was *assumpsit* to recover a balance due for advances. Credit was given for the freight due to *Catara* by the charter party, and the plaintiff claimed a right to the surplus freight, earned on the return voyage, for his own account.

The parties, under a rule of court, submitted "*this action, and all demands, which the defendant had against the plaintiff,*" to arbitrators, who awarded \$3175,61 to *Kleine* "in full satisfaction of all *Kleine's* demands submitted to them;" they then went on specially to state as the ground of their award, that *James Drake*, the agent of

Kleine, having neglected to comply with the stipulations of the charter party at *Havanna*, the referees considered *Catara* thereby exonerated from all obligation under the contract.

A motion was made to set aside this award, on the ground, that the referees had committed mistakes in point of law, and had not awarded upon all the matters submitted to them.

Williams, for the plaintiff, made the following objections to the award:—

1. The referees have mistaken the construction of a legal instrument.

2. They have mistaken the law, in deciding, that by the neglect or refusal of *Kleine's* agent to execute the terms of the charter party in *Havanna*, *Catara* was discharged from the obligation of the contract, whereas the only effect was to give a right to damages against *Kleine*.¹

3. That the award is not in full of all demands of *Catara* against *Kleine*. This was said to be suggested as matter of form only, which might be amended.

To shew, that the court had authority to set aside the award for a mistake in point of law, *Williams* cited *Kyd*. 351—380. 3 *East. R.* 18, *Kent vs. Elstob*.—19 *East. R.* 357, *Chace vs. Westmore*.—1 *Dall.* 313, *Williams vs. Craig*.

Blake, District Attorney, for defendant. The nature of the action is liberal and open, resembling a bill in equity. All the principles of equity, therefore, are applicable to this case.

¹ 11 *East. R.* 235, *Puller vs. Staniforth*—12 *E. R.* 496 (in note.)¹ *Bell vs. Puller*.—1 *Saund.* 320, *Pordage vs. Cole*, note per *Williams*, 4.

Although it is true in general, that when the referees have mistaken a plain point of law, (or of equity, if intending to proceed by equity,) the award, upon the face of which such mistake is apparent, is to be set aside, yet, whenever substantial justice appears to have been done, the award will be established. And though an award may not conform to the rules of law, yet if equity is adhered to, the court will not set it aside. Have the referees in this case stated, as the ground of their award, positions, which are not tenable?

The stipulation contained in the charter party, for the advance of two thirds of the value of the wine in *Havanna*, in case the wine should not sell there, was a principal inducement for making the contract on *Catara's* part; the freight being low, *Catara's* agent must have had some other profit in view. Was not then the owner discharged from the obligation of the charter party by the failure of *Kleine* to comply with this stipulation? If discharged, he was entitled to the future earnings of the ship.

It is argued on the other side, that *Catara* should have returned with an empty ship, and looked to the charterer for his indemnity. Though much is said in the books on the distinction between dependent and independent covenants, yet such a principle cannot be applicable to mercantile transactions. In the case of freight, for instance, the failure to provide a return cargo ought to discharge the ship owner, since he looks to such cargo, as the security for his freight.

It is therefore contended, on behalf of the defendant, that by the non-fulfilment of the stipulation to advance two thirds of the value of the wine, he was rightfully discharged from any farther observance of the conditions of the charter party, and that the referees have not mistaken the law, as to this point.

Sicletari, the agent of *Catara*, having taken up another freight for home, consigned, not to *Kleine*, as the return cargo was to have been by the terms of the charter party, but to a stranger to the contract, this was a freight, to which *Kleine* could have no title.

Suppose a vessel chartered for the *East Indies*, and a stipulation for an advance there to purchase a return cargo, which advance the charterer fails to make ; must the ship return empty ?

STORY, J. If she return full, it will be a deduction from the damages, to which the owner would otherwise be entitled against the charterer.

Blake. This we admit, and *Kleine* will have all the benefit of such allowance upon the principles contended for by the defendant.

It is immaterial upon what principles the referees calculated the balance due, since, had they adopted the principle, that *Kleine* was entitled to freight, and *Catara* to damages, the result would not have been more favourable to *Kleine*.

It is to be considered, whether the charter party was not void *ab initio*, *Sicletari*, who made it, having no written authority, nor any authority, but what his capacity of master gave him, and *Catara*, having from the first disclaimed the act.

[*Blake* was proceeding to argue this point, but was stopped by the court, this not appearing upon the award to be one of the grounds, upon which the referees had decided.]

In an action of this sort, where the charter party is introduced merely as a piece of evidence, to shew that a

certain sum of money ought equitably to be paid to the plaintiff, the court will not proceed upon the same strict maxims, as in an action of covenant on the charter party.

Prescott, in reply. There are two questions, 1, Did the referees mistake the law upon the face of the proceedings? 2, If so, can the plaintiff avail himself of that mistake?

Is the covenant, to advance two thirds of the value of the wine, a condition precedent, the non-performance of which discharges *Catara*?

The vessel, as to all the use that could be made of her, was in fact *Kleine's*. He had a right to do with her, as he pleased, only permitting *Cutara* to put on board the proceeds of the wine. It is now contended, that by not furnishing the means of doing this, *Kleine* discharged *Catara* from all that the latter had bound himself to do by the contract.

The stipulated advance was not a condition precedent. The other covenants on *Kleine's* part, to make insurance, &c. were before it in order of time, and were actually performed. So, on the other hand, *Catara's* covenant to proceed to *Havanna* was performed. *Kleine* had a right, immediately on the arrival in *Havanna*, to put on board a cargo, without first making the advance,

The advance is not to be considered alone. It is a universal principle, never departed from, that where the consideration is in part performed, the failure to perform the other part shall not release the opposite covenant.

It has been contended on the other side, that there was a virtual covenant by *Kleine* to load the ship, and that his not loading her discharged *Catara*. But the instrument is not to be so construed. The whole extent of the covenant is, that he will pay the hire, and it is at his discretion to put

on board more or less, or nothing. It is not material to *Catara*, his freight being the same.

It is, however, evident, that the referees allude, not to this stipulation, but to that respecting the advance; and the only question is, whether a failure in this could discharge *Catara*?

There can be no doubt, that for this failure, if unexcused, *Kleine* is answerable to *Catara*. But suppose *Kleine* had failed to make the insurance, which he stipulated to make, and a partial loss had occurred. Then too, he would have been liable to *Catara*. But would *Catara* have been discharged from his covenants in the *West Indies*?

The non-performance of a covenant does not operate a release, unless it be precedent and necessary to the performance of the covenants of the opposite party. In the present case, *Catara*, or his agent, might do every thing stipulated on their part, though *Kleine* should not fulfil his covenant to load. He might have returned empty, and there would then have been no difficulty; but he chose to contract for a freight. This freight is *Kleine's*. The vessel was his for the voyage. He had a right to load her or not, at his option, and a right to all freight earned by her.

As it respects security, there was enough in the contract itself. It was such as *Catara* was contented with. It may well be doubted, whether he would have had any lien on the cargo, even if he had brought one home, the vessel having been hired by a charter party, which differs from a mere letting to freight. *Kleine* might have put on board stones, or any other thing of no value.

[*STORY, J.* said he had no doubt, that when the charterer becomes owner for the voyage, there is no lien of the general owner for freight. It is confined to cases, where the carrier for freight is also owner for the voyage.]

STORY, J. In this case, a submission having been made "of this action and all demands, which the defendant has against the plaintiff," the referees have made a special award, stating the grounds and principles of their award. A motion has been made to set aside this award on the ground, that the referees have committed mistakes in point of law, and have not awarded upon all the matters submitted to them. In support of these objections, it has been argued, that if the referees mistake in a plain point of law or fact, either apparent upon the award itself, or made out in proof, the court ought to set aside the award.

To the generality of this position we by no means accede. The clear result of the authorities is, that the judgment of the referees is conclusive upon all matters of fact;² and, upon principle, it seems difficult to hold another doctrine, without destroying the whole object, as well as the authority, of the arbitration. If, however, there be an error of fact, as a mistake in calculation, apparent upon the face of an award, or if referees are satisfied, that such a mistake has intervened, and wish to correct the error, although the court will not set aside the award, yet it will recommit it, to rectify the mistake. As little do we incline to accede to the generality of the doctrine, as to mistakes in matters of law. It is certainly competent for the parties to submit the law, as well as the facts, to the judgment of referees, and to agree to abide by their judgment. There is neither inconvenience nor impolicy in supporting such an agreement. It is only substituting judges of the parties' own choosing for those, who regularly administer the law of the land. If the parties wish to reserve the law for the decision of the court, they may stipulate to that effect in

² *Price vs. Williams*, 1 *Ves. Jr.* 385.—3 *Bro. Ch. Cas.* 163.—1 *Bro. Ch. Cas.* 117, 536, *Morgan vs. Mather*, 2 *Ves. Jr.* 15.—*Drick vs. Milken*, 2 *Ves. Jr.* 23.

the submission; they may restrain or enlarge its operation, as they please. If no such reservation is made in the submission, the parties are presumed to agree, that every thing, both as to law and fact, which is necessary to the ultimate decision, is included in the authority of the referees.

Under a general submission, therefore, the arbitrators have rightfully a power to decide on the law and the fact; and an error in either respect ought not to be the subject of complaint by either party, for it is their own choice to be concluded by the judgment of the arbitrators.³ Besides, under such a general submission, the reasonable rule seems to be, that the referees are not bound to award upon the mere dry principles of law applicable to the case before them. They may decide upon principles of equity and good conscience, and may make their award *ex aequo et bono*. We hold, in this respect, the doctrine of Lord Talbot in the *South Sea Company vs. Bumbstead*,⁴ of Lord Thurlow in *Knox vs. Simonds*,⁵ of the King's Bench in *Ainslie vs. Goff*;⁶ and of the Common Pleas in *Delver vs.*

³ In *Chace vs. Westmore*, 13 East. R. 358, Lord Ellenborough says, "I fear it is impossible to lay down any general and certain rule upon this subject, in what cases the court will not suffer an award to be opened; it must be subject to some degree of uncertainty, depending upon the circumstances of each case." And in that case, the law and fact having been referred to a person competent to decide upon both, the court refused to open the award, unless some misconduct could be shewn on the part of the arbitrator. So in the civil law, "qualem sententiam dicat arbiter ad praetorem non pertinere Labeo ait; dummodo dicat quod ipsi videtur." *Paulus. ff. IV. 8. l. 10*. And the only exceptions were, "si inhonestum quid jusserit arbiter—vel ex gratia aut odio male judicavit." *Heinacc. ad ff. Pars. I. § 541*. "aut compromissi fines praetergressus, ea definierit. quae ejus arbitrio non erant commissae." *Voet. ad ff. IV. 8. § 24*. But a distinction is to be observed in the civil law, between the *arbitrator* and *arbiter*. The award or sentence of the former was subject to correction or reduction "ad arbitrium boni viri." The difference between them is explained *Wood's Inst. 328*. and see *Voet. on the Pandects, L. IV. tit. 8. § 25*.

⁴ 2 *Eq. Cas. Abr.* 80. pl. 8.

⁵ 1 *Ves. Jr.* 369.

⁶ *Kyd. on Awards* 351.

*Barnes.*⁷ If, therefore, under an unqualified submission, the referees meaning to take upon themselves the whole responsibility, and not to refer it to the court, do decide differently from what the court would on a point of law, the award ought not to be set aside. If, however, the referees mean to decide according to law, and mistake, and refer it to the court to review their decision, (as in all cases, where they specially state the principles, on which they have acted, they are presumed to do,) in such cases, the court will set aside the award, for it is not the award, which the referees meant to make, and they acted under a mistake. On the other hand, if knowing what the law is, they mean not to be bound by it, but to decide, what in equity and good conscience ought to be done between the parties, their award ought to be supported, although the whole proceedings should be apparent on the face of the award. And this in our opinion, notwithstanding some contrariety, is the good sense to be extracted from the authorities.⁸ In *Morgan vs. Mather*, Lord Loughborough lays it down as clear, that corruption, misbehaviour, or excess of power, are the only grounds for setting aside awards; and although in the same case Mr. Commissioner Wilson says, that arbitrators cannot award contrary to law, because that is beyond their power, for the parties intend to submit to them only the legal consequences of their transactions and agreements; yet this reasoning is wholly unsatisfactory, not only from its begging the question, but from its being in direct opposition to very high authority.

If, in the case before the court, the referees had made a general award, without any specification of the reasons of

⁷ 1 Taunt. R. 47.

⁸ *Morgan vs. Mather*, 2 Ves. Jr. 15.—*Ching vs. Ching*, 6 Ves. Jr. 222.—*Young vs. Walcr*, 9 Ves. Jr. 364.—*Kent vs. Elstob*, 3 East. R. 18.—*Driver vs. Barnes*, 1 Taunt. R. 48.—*Chase vs. Westmore*, 13 East. R. 357.—*Ainslie vs. Goff*, Kyd. on Aw. 351.

their decision, it would have deserved very grave consideration, whether we could, by collateral evidence, have examined into the existence of any errors of law. We are not prepared to say, that such a course would be proper, unless the submission were restrained to that effect, or misbehaviour were justly imputed to the referees. But here the referees have expressly laid the grounds of their decision before us, and have thereby submitted it for our consideration. This course is not much to be commended. Arbitrators may act with perfect equity between the parties, and yet may not always give good reasons for their decisions; and a disclosure of their reasons may often enable a party to take advantage of a slight mistake of law, which may have very little bearing on the merits. A special award, therefore, is very perilous; but when it is once before the court, it must stand or fall by its intrinsic correctness, tested by legal principles.

We will now consider, how far the present award can be sustained upon these principles; and in order to apply them, it will be necessary to consider, what are the material facts, upon which the award is founded.

[Here the Hon. Judge recapitulated the facts above stated.]

Upon these facts, which, so far as the present questions are concerned, are to be deemed to have been fully proved, the arbitrators decided, that Mr. *Drake*, the agent for the plaintiff at the *Havanna*, having neglected and refused to execute the charter party, agreeably to the letter and spirit thereof, the defendant was of right discharged from any farther observance of its conditions; that the plaintiff had no just or legal claim to any of the freight or earnings of the vessel, on her voyage from *Havanna* to *Boston*; and that he, in equity, was entitled to a reimbursement of his advances, with interest and customary com-

missions, and upon these principles they found a balance in his favour of \$3175,65.

It is argued, that the arbitrators have erred in both these particulars ; that the omission to comply with the stipulations on the part of the plaintiff did not discharge the defendant from his obligation to perform those on his part, but only rendered the plaintiff liable to pay damages to the defendant ; and that, under the charter party, the plaintiff must be deemed to have been owner of the ship for that voyage, and as such was entitled to all her freight and earnings.

Upon the true construction of the charter party, there was a covenant on the part of the plaintiff, not only to advance the defendant two thirds of the estimated value of the wine, but also entirely to load that part of the ship, which was chartered by him, at the stipulated price per quintal. He wholly failed so to do, and thereby became liable, in case the ship returned empty, to pay the whole freight, which would have been earned, if he had complied with his covenant. This seems to be the doctrine of the maritime law ;⁹ and it does not in effect differ from the common law.¹⁰ But the question here is, whether the ship is, under such circumstances, bound to return empty, and the owner obliged to pursue the voyage, although its whole objects are defeated, and look for recompense to the event of a suit for damages. It is said, that such is the conclusion of law, unless the court shall construe the covenants in the charter party, as dependent covenants. We do not yield, however, to this argument, and no authority has been cited

⁹ *Roccus de Nav. n. 85.*—1 *Valin Comm.* 642.—*Beawes, Title Freight*, 110. [129.]

¹⁰ *Abbott on Shipping*, p. 3, ch. 7, § 2.—*Edwin vs. E. I. Company*, 2 *Vern.* 210.

in support of it. Admitting the covenants to be independent and reciprocal, it does not follow that either party is bound to go on, when the whole objects of the agreement are defeated by the voluntary act of the other. In short, the principle would come to this, that on a covenant to carry a full cargo to a port at a stipulated hire, the owner of the ship would be obliged to perform the voyage, although the merchant utterly refused to furnish any cargo, or became incapable of so doing. On the one hand, if such a covenant were to be deemed a case of dependent covenants, the owner of the ship would not be compellable to proceed on the voyage, if any thing, however small, short of a full cargo, were furnished. On the other hand, upon the same reasoning, if the contract were to carry a full cargo, and less were carried, by the neglect of the owner of the ship, no freight would be due for the cargo actually transported. Yet such a construction would be in utter hostility to decided cases.¹¹ From the reason of the thing, therefore, covenants of this kind have been, in general, deemed independent; but even then a total failure by one party, going to the whole consideration of the contract, would be sustained as a bar to an action for non-performance by the other.¹²

The correct principle, in contracts of this nature, would seem to be, that where the whole consideration for any stipulation fails, or where any stipulation becomes incapable of being performed substantially in the manner which the parties intended, by the voluntary act of either of them, the other party is not bound to proceed, but is at liberty to decline a performance thereof on his part.

Equity would certainly persuade to such a conclusion, and it will be found on examination, that it comports with

¹¹ *Ritchie vs. Atkinson*, 10 East. R. 295.

¹² *Havelock vs. Geddes*, 10 E. R. 555.

law. *Molloy* (B. 2, ch. 4, s. 3.) holds, that if a time be appointed by the charter party, and the merchant is not ready to load the cargo, the other party is at liberty to seek another cargo, and hath his remedy for damages : and this doctrine is cited and approved by *Abbott*,¹³ and seems confirmed by *Roccus* (*De Nav* : n. 85.) It seems also to have been conceded by all sides to be correct in *Laurie vs. Jamieson and Co.*¹⁴ and stands supported by the decision in *Bell vs. Puller*.¹⁵ Indeed, *Abbott* insists, that in such a case it would be *the duty of the master*, on his arrival at the port of lading, to obtain another cargo, if possible, from other persons, and not sullenly to hoist sail and depart, in order to charge the merchant with the whole freight.¹⁶ And the Supreme Court of *New York* (in *Robertson vs. Bethune*)¹⁷ have decided, that when the return cargo was not ready to be put on board at the appointed time, from that moment the contract terminated to all intents and purposes, and both parties were absolved from all future liability under it. This is indeed pressing the doctrine to a greater extent, than we deem necessary for the present decision.

Upon the footing then of authority, as well as of principle, we think that the neglect of the plaintiff to furnish a cargo pursuant to the charter party, absolved the defendant from a farther prosecution of the voyage, if he should so elect ; and enabled him rightfully to engage another cargo for an other voyage. We think that sound policy and mercantile convenience, equally with the interests of

¹³ *On Shipping*, pt. 3, ch 1, s. 8, p. 225.

¹⁴ *Abbott*, p. 3, ch. 1, s. 10, p. 230.

¹⁵ 2 *Trust.* 285. See also *Puller vs. Halliday*, 12 *East. R.* 494.

¹⁶ *Abbott on Shipping*, p. 2, ch. 11, § 3, p. 457.

¹⁷ 3 *Johns. R.* 342.

all parties, and the principles of distributive justice, fully support us in this conclusion.

In this respect, there is no error of law in the award of the referees, for they have not in effect held a more extensive doctrine.

This view of the subject might well dispose of the second objection ; but we think it admits of a satisfactory answer upon other grounds. The argument, that the plaintiff was owner of the ship for the voyage, and therefore the freight earned was for his account, is utterly untenable. So far was he from being owner for the voyage, that the whole ship was not even chartered to him. He had a right only to the use of the hold, and also of the part between decks of the ship. The ship was also navigated at the expense of the original owner, and the master was appointed by him. There was therefore no general hiring in the charter party ; but a mere special hiring of the ship to bring a cargo to the *United States*. The authorities, both in *England* and the *United States*, are decisive against the plaintiff as to this point.¹³ There is no ground therefore to consider the master as the agent of the plaintiff and contracting for his benefit under the new affreightment entered into at the *Havanna*, for, whether the new voyage were tortious or rightful, the earnings of the ship belonged to the original owner. If rightful, then he would take them without account to the charterer ; if wrongful, then he would only be responsible for the tort in damages. Being of opinion, that the conduct of the master was in this case rightful, we overrule the objection to the award of the referees, on the question of the freight earned on the return voyage.

¹³ *Vallejo vs. Wheeler, Comp.* 143.—*Hoe vs. Groverman*, 1 *Cranch, R.* 215. *McIntire vs. Bonne*, 1 *Johns. R.* 229.—*Fletcher vs. Braddick*, 5 *Bos. & Pul.* 182.—*Cheriot vs. Barker*, 2 *John. R.* 346. *Puller vs. Halliday*, 12 *East R.* 494—and particularly *Marcadier vs. Chesapeake Ins. Comp.* 8 *Cranch, R.* 39.

The only objection remaining is, that the award is not as extensive as the submission. The award is only as to the demand of the plaintiff submitted in this action, whereas the submission was also of all demands, which the defendant had against the plaintiff. Where the submission is of general matters, without any clause that the award shall be made of the premises submitted (which is technically called an *ita quod*, &c.) it seems to have been holden, that an award of a part only of the premises submitted is good, at least if the matters omitted were not necessarily dependent upon and connected with the other points.¹⁹

Perhaps the more reasonable rule, countenanced by respectable authority, is, that the arbitrators are bound to award upon all matters within the submission, which are actually controverted before them, whether there be such a special clause of *ita quod*, &c. or not.²⁰ Be this as it may, it is very well established, that although the submission be general with or without a clause of *ita quod*, &c. an award is good of a single matter, if none other were laid before the arbitrators,²¹ and that will be presumed until the contrary is shewn.²² But if it be shewn, that other matters were

¹⁹ 8 Co. 98 *Baspole's case*—Cro. Jac. 200, 355—*Simmonds vs. Swaine*, 1 Thurt. R. 349.

²⁰ *Saund. R.* 33, note 1.—*Randall vs. Randall*, 7 East, 81—*Ingram vs. Milnes*, 8 East. R. 445.

[Dig. Lib. IV. Tit. 8, l. 19, § 1.—“ Si de pluribus rebus sit arbitrium receptum; nisi omnes controversias finierit, non videtur dicta sententia; sed adhuc erit a praetore cogendus.”]

[²¹ Dig. Lib. IV. Tit. 8, l. 21, § 6.—“ Si forte de una re sit disputatio, licet pleno compromisso actum sit, tamen ex ceteris causis actiones superesse; id enim venit in compromissum, de quo actum est.”—In *Webster vs. Lee*, 5 Mass. R. 334, it was held to be competent for a party to a general submission to shew, that a particular demand was not laid before the referees, and that, upon this being proved, an action might be maintained upon such demand.]

²² *Baspole's case* 8 Co. 98—Cro. Jac. 200, 355.—*Hawkins vs. Colclough*, 1 Burr. 274. *Ingram vs. Milnes*, 8 East R. 445—*Hodges vs. Hodges*, 9 Mass. R. 320.

before the referees, on which they have not awarded, *although they intended so to do*, there can be no doubt, that the award ought not to be accepted. In the present case, it is admitted that such was the intention of the arbitrators; and as they have omitted to express their award with technical propriety, so as to reach every thing in controversy before them, we shall order it to be recommitted to them for this purpose.

*Award recommitted.**

G. Blake, for defendant.

Prescott and S. K. Williams, for plaintiff.

* The award was afterwards amended by the arbitrators and accepted.

THE BOTHNEA AND CARGO, AND THE JANSTOFF AND CARGO.

Case of collusive capture. Farther proof denied to the captors, and condemnation to the *United States* subject to the rights of the seizing officer. In what cases farther proof allowed or not.

It is the duty of captors to bring in the prize crew, or at least the master and principal officers, with the prize, for adjudication.

STORY, J. These cases come before the Court under very unusual and embarrassing circumstances. From the documents and testimony in the preparatory evidence it appears, that the *Bothnea* and the *Janstoft* are foreign vessels, having on board, as is confessed on all sides, false and simulated Swedish papers. They both sailed from *Halifax*, in *Nova Scotia*, about the 24th of November, 1813, laden with cargoes of English goods, destined for the *United States*; and, on the same day, were captured near the

Bothnea and Janstoft.

Ragged Islands, either really or collusively, by the privateer *Washington*, of 24 30-95 tons, one gun, and fifteen men, belonging to *Portland*, and commanded by *William Malcomb*. They were captured in sight of each other, the *Janstoft* first, within about three hours, and the *Bothnea* within about nine hours, after leaving *Halifax*. At the time of the capture, there were on board of the brig seven persons, and on board of the schooner five persons, composing their respective crews, and one American passenger in each vessel. The whole of the crews were taken from each vessel, and landed at the *Ragged Islands*; the American passengers were retained on board, and under the superintendence of prize masters and crews; the *Bothnea* was conducted into *Salem*, and the *Janstoft* into *Plymouth*, in the District of *Massachusetts*. Immediately upon their arrival, they were seized by the collectors of those ports for an alleged fraudulent violation of the non-importation act. Proceedings were also had by the captors against both vessels, as prize of war, before the District Court of *Massachusetts*. The passengers, viz. *Isaac Miller* and *Nathaniel Whittemore*, were examined on the standing interrogatories, and the ship's papers were deposited in court by the prize masters. The papers, found on board of the *Bothnea*, were certain Swedish simulated ship's papers, two bills of lading of the cargo, dated the 23d of November, 1813, purporting that the whole cargo was shipped by *John Moody and Co.* merchants at *Halifax*, for *New London*, consigned to order; a clearance from *Halifax* dated on the same day, a British license from Sir *John Sherbrooke*, dated at *Halifax* on the 9th of November, 1813, authorizing *John Moody* and others to export, in any vessel not belonging to *France*, to any port in the *United States*, any British goods on British or American account, which license was to continue in force for two months, and two let-

ters dated at *Halifax* on the 23d of November, 1813, one purporting to be addressed to the consignee of the cargo, the other to be addressed to the captain of the *Bothnea*. These letters are as follows. ' The papers on board of the *Janstoffs* were, certain Swedish simulated ship's papers, a British license and clearance of the same date and purport, as in the case of the *Bothnea*, two bills of lading of

Halifax, November 23d, 1813.

Dear Sir,

We now only inclose you bill of lading of the cargo shipped on our joint account per the *Bothnea*, agreeable to the memorandum left with us by *Vanderbut*, when last here. The invoices we forwarded in duplicate, one by *P. Jones*, and the other by *Schonenburg*, which you will have received before this. *Z.* has our particular instructions how to proceed, when in with the Squad.—We have settled for *A.*'s share of the compensation. *B. 2* will pay his.—We have fixed on 200 dollars, exclusive of the freight, which we have also arranged for.

Most sincerely do we wish this speculation to succeed. At the same time, request your earliest advice how to proceed with the next. Do not trust too much paper. We have directed *Z.*, in case of meeting with an American cruiser, to destroy all!—We are, &c.

J. MOODY & CO.

Halifax, November 23d, 1813.

Capt. *I. K.*—Schooner *Bothnea*,

Sir,

We hand you herewith sundry enclosures respecting the cargo of the *Bothnea*, to your most particular care. You will perceive the necessity of using every possible caution. We are only apprehensive of shaving mills. You will of course secrete every thing respecting this transaction.

In case of British interruption, we must recommend your being well assured, that there is no deception, as you must be aware of the facility, with which American cruisers may pass for English. The invoices of these goods are already forwarded. You will make the best of your way to *N.*—When in with any of the *B. B.* squadrons, come forward with your *Ex. Li.* which will safely pass you, and then nothing will remain, but activity and despatch in getting the goods on shore. We should not have embarked ourselves so largely in this concern, but from the ease with which dry goods can be smuggled into those places, if properly managed. The bill of lading is to order. You will, therefore, receive instructions from our friends *A. 1* and *B. 2*. We expect your best plan will be to lay off under the protec-

Bothnea and Janstoft.

the cargo dated on the 23d of November, 1813, on the same account, destination and consignment, as in the case of the *Bothnea*, and two letters dated at *Halifax* on the same day, one addressed to Messrs. B. 2 and A. 1, *New London*; the other to the master of the *Janstoft*. The last of these letters is an exact copy of that addressed to the consignee of the *Bothnea*, except in the direction; the other is as follows: ²

tion of H. M. ships, and deliver the cargo in boats and lighters, without proceeding farther, and as our friends are already advised on the subject, no doubt every necessary step will be taken. Should, however, any unexpected casualty happen, we recommend your getting out of the way, as we would rather the whole should be sacrificed, than any mischief happen to ———; but above all things keep out of sight your Ex. Li. clearance, and this letter. Do not confide too much. If you have any suspicion, destroy all at once, and after committing this to memory, be sure to *put it perfectly out of danger*.

As to the return cargo, we need not say any thing on the subject, having the fullest confidence, that a voyage to *St. Bart's* may be profitably effected with *certain articles*; flour out of the question, unless rye.—B. No. 2 will pay you the compensation agreed, exclusive of the freight we have allowed. A's proportion we will settle with our own.

If it is possible to obtain convoy, we will, but it is doubtful. We are, &c.

JNO. MOODY & CO.

P. S. Do not write for fear of accidents. Let your communication be verbal.

² *Halifax, Nova Scotia, November 23d, 1813.*

Capt. P. S. Z.—*Brig Janstoft*,

Sir,

We now wish you to proceed as immediately as possible with the cargo, agreeable to our verbal directions. We are fearful of entering too fully into particulars, but as this cargo is altogether B. manufactures, you will have more difficulty to contend with; however, we trust to good luck. Secrete, with every possible caution, certain documents, and do not be too easily satisfied by *appearances*. You know how easy an imposition may take place; but as we calculate on convoy both for you and the *Bothnea*, we do not apprehend any danger, till you are well near your port. The risk is, that even your colours would not be sufficient in case of meeting an A—— cruiser. When you get in with the Bri. men of war, you may safely produce your

At the hearing, a claim was interposed by the District Attorney, in behalf of the *United States* and of the collectors, praying a condemnation to them, upon the ground of a collusive capture, and fraud upon the non-importation act. An application was also made by the captors for an order for farther proof, to prove that the vessels and cargoes were in fact the sole property of British subjects, which was rejected; and on the first day of February, 1814, the District Court dismissed the libel of the captors, and condemned both vessels and their cargoes to the *United States*. From this decree an appeal has been interposed to this Court, and here the application has been renewed for farther proof. The propriety or impropriety of allowing such an order depending upon the nature of the case disclosed upon the original evidence, I directed the cause to be argued, and it has accordingly been argued upon that evidence, and it now remains for me to pronounce a decision.

Before I enter on the discussion of the merits of the particular cases, now before the Court, I will advert to some considerations touching the nature of farther proof. And I conceive, that in no case whatever is the court ab-

Ex. and under their protection get all out in boats and lighters. You will hear in mind, that the concern is the same with the *Bothnea*. We have forwarded the particular invoices to our friend A. No. 1, who will pay you the compensation fixed both on our own account, and of the other parties. As the blockade of the Sound is likely to be rigorous, we leave it to your own calculations, whether another trip to *St. Bart's* can be undertaken. The fact is, flour will not meet the demand calculated, as government stores are well supplied, nor do we think it can be procured with you, to answer the market, for some time.

Be careful of committing any of the concern with us or yourself; we indeed think you had better give all up, and get away, rather than expose the business, should you be intercepted; and our greatest danger is from the small travellers in shore, therefore better keep close with John Bull. We are, &c.

JNO. MOODY & CO.

solately concluded by the original evidence. It is at liberty to entertain doubts extrinsic of such evidence, and to be satisfied of the verity of the transaction by proofs drawn beyond the mere formal papers and attestations of the parties. It will not however exercise its discretion in cases liable to no just suspicion; but will content itself with an adherence to its ordinary course, unless there arise some doubt upon the original papers, or some stringent evidence from an extrinsic source.³ In cases of reasonable doubt it will admit the claimant to farther proof, where his conduct appears fair, and is not tainted with illegality. It is more sparing in its indulgence to the captors from an anxious solicitude to avoid complex proceedings and collateral inquiries. It therefore rarely allows it to the captors, where the transaction appears unsuspecting upon the preparatory evidence.⁴ It will however yield to such an application, where strong circumstances or obvious equity require it. But in all such cases, it is admissible only under the special direction of the Court.⁵ And such direction can never be obtained, where there has been gross misconduct or fraud, or the case does not admit of a fair explanation, on behalf of the captors. The French law as to prize differs in this respect; for the evidence of the captors is not only admissible, but constitutes an essential ingredient upon the original hearing.⁶

Upon examining the facts of the cases before the Court, it seems difficult, upon the first blush, not to entertain some

³ *The Sarah*, 3 Rob. 330.—*The Romeo*, 6 Rob. 351.

⁴ *The Sarah*, 3 Rob. 330.—*The Haabet*, 6 Rob. 54.

⁵ *The Jonge Jacobus*, *Baumann*, 1 Rob. 243.—*The Odriana*, 1 Rob. 314.—*The Maria*, 1 Rob. 340.

⁶ *Valin des Prises*, ch. 13, p. 193.—2 *Valin. Comm.* 324, *Ordin, Louis* 14, lib. 3, tit. 9, art. 24.

doubts, whether the colouring is not artificial. Perhaps, when once awakened, the mind becomes too ready to indulge in vague and indistinct suspicions. The very simplicity of a transaction, and the face of honesty, which it wears, may, under such circumstances, attract a weight of jealousy, more formidable than the most complicated tissue ever woven by the ingenuity of fraud. Every appeal to the understanding then comes attended with the grave warning, *nimum ne crede colori*.

It becomes necessary, therefore, to sift the various circumstances of suspicion combined in these cases, and to ascertain their value. I do not say, that each is to be separately weighed, as if it stood alone. The absolute force of a single fact may not be great, but combined with a mass of strange occurrences, it may acquire an adacitious, and perhaps decisive preponderance.

One of the most striking characteristics of the present cases, is the extraordinary nature of the equipment and voyage. Here were two vessels, under spurious neutral flags, loaded with extremely valuable cargoes of British merchandise on British or American account, destined for the *United States*, and beyond all question upon an illegal traffic. The crews of the vessels consisted apparently of foreigners; but the fraudulent simulation of the neutral papers was so obvious, that it could not deceive the most negligent cruiser. The British license and clearance, and the documents, which respected the cargo, if produced, would afford such incontrovertible evidence of illicit trade and British interests, as would ensure condemnation of both vessels and cargoes. The same result would unavoidably flow from a suppression of those papers. The case would, therefore, under every aspect, be pregnant with insurmountable difficulties. Under such circumstances, if the voyage were really intended for *New London*,

it would be natural to suppose, that the vessels would be equipped with arms, at least to defend themselves against small American cruisers. The neutral disguise was so thin, that a want of armament would hardly be apologized for by the innocuous garb of neutrality. Yet there is not the slightest pretence of any armament.

It may be said, that the letters found on board point to the existence of *convoy* for the voyage, and thereby rendered any armament unnecessary. If a British convoy were really expected, how happened it, that no such convoy was found, although the vessels sailed on the very next day after these letters were written? If by *convoy* was meant the *convoy* of the *Washington* privateer, it would afford a more ready solution of the difficulty.

In the next place, on a real destination to *New London* in a smuggling trade how happened it that one American passenger was put on board of each vessel, and each of them engaged and employed by Messrs. *Moody and Co.* with such notoriety, that each knew the whole object of the voyage. It is asserted, and very gravely, by the passengers, that they are utter strangers to the whole adventure, and that they have no interest therein. If this be true, I should be glad to know, what recommended them to Messrs. *Moody and Co.* for such a service. As Americans of honor and integrity they would feel an interest to disclose on their arrival so gross a fraud on our laws. If they were not therefore actors in the drama, they might be unfortunate marplots. It is utterly incredible, that mere strangers should be trusted with such important secrets. They must have had some character, which has not been avowed, and that character could have been little short of the confidential agency of the parties. I confess, that I should have been glad to have learned a little more of the

history of these gentlemen, upon what occasions and in what manner they found their way to *Halifax*. There is a perfect silence in their answers on this head; and one of them only states, as if by accident, that he had a parole, as a prisoner of war. If the captures were collusive, I can readily conceive a good reason for these gentlemen being on board, even without the character of confidential agency; if the captures were *bona fide*, I am yet to learn, how this circumstance can be reasonably explained.

In the next place, the circumstances of the capture are somewhat extraordinary. The vessels had hardly been out of port three hours, before, in the very mouth of British territory, they were met by the privateer, and both captured without the slightest resistance or attempt to escape. It is said, that the privateer was mistaken for a British cruiser. Now, though in the *Bothnea* (which was last captured) the passenger answers, that the master shewed to the captain of the privateer the ship's papers, "believing him to be a British cruiser," there is no evidence in the *Janstoft* to shew a similar mistake. The omission may not be material; and in all probability the privateer did board under British colours. Now, admitting this fact, why were not the papers concealed from the cruiser? It is said, that supposing her to be British, there was no danger in the disclosure. But let us look at the letters on board. In the letter to the master of the *Janstoft* he is expressly warned to "secrete with every possible caution certain documents, and not to be too easily satisfied by appearances."—"You know how easy an imposition may take place."—"Our greatest danger is from the small travellers in shore, therefore better keep close with *John Bull*."—To the master of the *Bothnea* the language is

equally explicit.—“We are only apprehensive of shav-
ing mills; you will of course secrete every thing respect-
ing this transaction. In case of British interruption, we
must recommend your being well assured, that there is no
deception, as you must be aware of the facility with which
American cruisers may pass for English.” “Do not con-
side too much. If you have any suspicion, destroy all
at once, and be sure to put it perfectly out of danger.”—
Nothing can be more strong, than this language, as to the
conduct to be observed in case of being searched by any
armed ship. Yet not a single paper was suppressed or
destroyed. All was produced, and upon the mere pre-
tence, that the privateer assumed herself to be British.—
The place of capture too was immediately within reach
of British ports. Under such circumstances, would not a
master, entrusted with so valuable a cargo, with such
pointed instructions, have used more caution? Would he
not have insisted on being carried into *Halifax* for adjudi-
cation, or on having a British commission and documents
shown him, or in some other way have tested the sincer-
ity of the character of the captors, before he would have
put the whole property into such imminent hazard?—In fact,
if the capture were collusive, every thing should have hap-
pened just as it did. If it were *bona fide*, there seems to
have been unusual negligence or stupidity on the part of
the captured. It is strange too, that the *Bothnea* took no
alarm. She saw the capture of the *Janstoft*, and must
have deemed it at least a questionable case; still however,
she kept on her regular course undisturbed by the dangers,
which were thickening about her, and blind to the sinister
omens.

Another extraordinary circumstance attending the cap-
tures was, that the whole crews were taken out and land-
ed at the *Ragged Islands*, and the American passengers

Bothwell and Janstoff.

kept on board, as the solitary witnesses to the transactions. It will be recollected, that this was nearly eighteen months after the declaration of war, and when there was scarcely a pretence for ignorance of the manner, in which prizes were to be conducted into port. The privateer's crew consisted also (as both parties agree) almost altogether of masters and mates of vessels, who were also the owners of the privateer. There was also a bounty paid by the government for prisoners of war. Under such circumstances therefore there was scarcely an apology for omitting to bring in the captured crews. Yet a greater irregularity than the omission so to do could hardly have occurred. It is the duty of the captors to bring in the prize crew, or at least the master and principal officers; with the prize, for adjudication. This duty is not only enjoined by the prize act, but is enforced by the express instructions of the *President*, which are delivered to every cruiser with her commission. It is also invariably required by the practice of the Admiralty, and its omission is reprehended in the strongest terms by prize courts.¹ Indeed, unless it be explained, it is considered as almost amounting of itself to evidence of management or tampering or fraud; and the courts have invariably withheld a sentence of condemnation, even in the clearest cases, where this omission has appeared, until a satisfactory explanation has been given.² I do not say, that it is such an irregularity, as amounts to a forfeiture of the right of prize; but I adopt the principle of the learned counsel for the claimants, that if the captors have not been prevented by necessity, accident, or excuseable error, from producing the captured crew for examination, they are not entitled to any indulgence from the Court; and the Court will not let them into the benefit of farther proof. It will not aid them

¹ *The Speculation*, 2 Rob. 293.

² 5 Rob. 385. *f. note a.*

any more, than it is compelled to do; but leave them to reap the fruits of their own misconduct, however bitter or unpalatable they may be.

Upon what pretences then is this irregularity attempted to be justified? It is not asserted, that the captors were in ignorance that any person belonging to the crew was to be brought in. Their conduct as to the American passengers evinces the contrary. Yet why should the passengers have been chosen for this purpose?—If asked, they might have declared their ignorance of the whole transactions, which would not have made them the best of witnesses. It is said, that the whole crews were removed, and the same number of Americans put on board in their stead, with a view to elude capture by the British cruisers, if overhauled, by passing for the original Swedish crew. Now I cannot but think this excuse to be extremely unsatisfactory. How would it have been possible for Americans to pass for Swedes or other foreigners? Our very accent and dialect would betray us to the most raw and inexperienced of British commanders. If the passengers on board were really confidential agents, (and I beg to know, how the captors had any proof of the negative) would they not have had strong inducements to disclose the facts to a British cruiser?—And if they were mere strangers, what right had the captors to expect an active cooperation in their own particular schemes? It is said also, that it became necessary to remove the crews on account of their number, which nearly equalled that of the privateer. This might account for the removal of some part of the crews, but it is hardly sufficient to meet the difficulty of the removal of the whole. The masters at least might have been retained. A course quite as natural would have been, to put a part in confinement in the privateer, and in company with the prizes to seek the first American port for safety. The

landing too of the crews at the *Ragged Islands* seems a measure peculiarly well calculated to give notice to the enemy of the capture, and to enable him, with ordinary diligence, to attempt a recapture. If all these occurrences took place in perfect good faith from the ignorance or the lenity of the captors, it is extremely unfortunate, for they are precisely such, as we should expect in a case of collusive capture.

There are other circumstances in the case, respecting which the ingenuity and eloquence of counsel have been employed to attach, or repel, the imputation of fraud. I forbear to touch them. Some of them are of light and trivial import, and some of a graver cast. But independent of the singularities, which I have before enumerated, I do not think that they can be entitled to much consideration.

On the whole, do these cases, taken in connexion, for it is quite impossible to separate them, present, under all the circumstances, a fair and natural transaction, or an artificial and well adjusted fraud?—If the circumstances are such, as are consistent with good faith, and admit of a reasonable explanation, then farther proof may be indulged to the captors. If they appear incapable of such explanation, it ought peremptorily to be denied.

It is remarkable, that upon the supposition of a collusive capture by an agreement between British and American subjects engaged in an illegal traffic, the whole conduct of the parties, and the appearances of the documents on board are consistent. No incongruity has been shewn in argument, and, upon farther examination, I have not been able to discern any. On the other hand, the conduct of the parties, and some expressions in the letters, admit of a more ready solution upon the same supposition, than if the capture were to be deemed *bona fide*. These expressions may be considered as containing the real wishes and in-

Bothnea and Janstoff.

structions of the parties concerned, mingled with such disguises, as might cover the fraud from a careless observer. What is said of convoy, of the extreme anxiety of the parties to be kept from exposure in case the enterprise should be intercepted, and of their solicitude to avoid American cruisers, may be deemed of this description. I do not say, that they exclusively point to such an interpretation, but they readily admit it. There is also one expression in each of the letters addressed to the consignees, which, I cannot but think, has a meaning, which the passengers perhaps could have explained. It is this, "we have directed Z. in case of meeting with an American cruiser, to destroy all." Who is the person thus designated by the letter Z? It cannot be the master of the *Janstoff*, who is called *Zwilltram*, because the same expression occurs in the letter on board of the *Bothnea*, whose master is called *Koon*. It is inconceivable, that the authority to destroy should not have been given separately to some person on board of each vessel, as they might separately have encountered an American cruiser. I cannot therefore but believe, that Z. was the mystic name of the confidential agent of the parties on board of each vessel, though I pretend not to point a finger at the personage.

It is possible, that I have attached more weight to the extraordinary circumstances of these cases, than they deserve. Knowing the strong temptations to illicit intercourse in consequence of the high price of British manufactures, I may have indulged in too rank suspicions. I have the consolation however to know, that if in this I commit an error, it can, and it will, be corrected by the wisdom of a superior tribunal. My own judgment however must be my guide, and I am free to declare, that I consider the appearances of collusion to be so marked on this transaction, and so entirely incapable of a fair expla-

nation, that I must reject the application for farther proof, and dismiss the libel, so far as it respects the captors.

If I had even deemed farther proof admissible on the part of the captors, that proof could not have extended beyond the explanation of the facts of the capture. To allow it farther, would be to substitute, instead of the regular evidence required by the law, evidence which might be procured after time given to tamper with witnesses, and to enable the parties to mould a history suited to the pressure of the occasion. Such an application I should hardly deem allowable under any circumstances.

I do not think it necessary, as these causes must go to the Supreme Court, to take time to consider, to whom the property ought to be adjudged, whether to the *United States* alone, or to the *United States*, subject to the rights of the seizing officers. As at present advised, I am very clear, that it ought to be condemned *jure belli*, as enemies' property; and I shall accordingly condemn it to the *United States*, subject to the right of the collectors to share in the proceeds, as seizing officers. Upon the appeal, the question, in case of a condemnation to the *United States*, must necessarily come in review before that court.

I wish it to be understood, lest by any mistake the papers should find a place in the record, that I expressly reject the additional affidavits of the prize masters, which were objected to at the hearing in the District Court and in this Court. They are admissible only under an order of farther proof, which was refused in both courts.*

W. Prescott and Otis, for the captors.

Blake and Dexter, for the claimants.

* On appeal to the Supreme Court, after argument, farther proof was directed; and at February term, 1817, upon the hearing of the farther proof, the decree below was reversed, and condemnation passed to the captors. 2 *Wheaton's R.*

Diana and Cargo.

THE DIANA AND CARGO, TAPPAN CLAIMANT.

The custody of the papers of captured vessels belongs exclusively to the prize court.

It is the duty of captors, immediately upon arrival in port, to deliver, upon oath, all the papers of captured vessels into the registry of the prize court.

Prize goods are never delivered on bail until after a hearing; and a contrary practice is a great irregularity. Nor is a claimant ever entitled to a delivery on bail, even after a hearing, unless he shews a *prima facie* legal title to the property. If he claim by an illegal act, he is not entitled to a delivery on bail.

During war, no claim standing in opposition to the ship's papers and preparatory evidence is ever admitted in a prize court.

No commission to take evidence in an enemy's country is allowable by the practice of the prize courts.

A shipment, made after a known war, by an American citizen, from an enemy's port to a port in his colonies, is illegal by the law of war. It is a trading with the enemy.

It seems, that if a delivery on bail has been allowed by the District Court in a gross case of illegality, the appellate court will not hold itself bound by the transaction; but direct the claimant to account for the whole proceeds on oath.

THE facts in this case were as follows :—

The ship *Diana* and cargo were captured by the private armed ship *Thomas*, commanded by *Thomas M. Shaw*, on or about the 10th of May, 1813, and sent into the port of *Wiscasset*, in the District of *Maine*, for adjudication. From the papers found on board and the preparatory examinations it appeared, that the ship and cargo were duly documented as British property, and that she sailed from *Liverpool* in *Great Britain*, in the month of April, 1813, touched at *Cork* for convoy, and at the time of capture was steering in the regular course of her voyage for *Halifax* in *Nova Scotia*, the port of her destination. The cargo consisted altogether of goods of British manufacture, and was consigned, by merchants in *Great Britain*, to merchants in *Halifax*.

Proceedings on the prize side having been instituted in the District Court of *Maine*, and no claim having been in-

terposed to the vessel, or to any part of the cargo, except thirty-nine cases of merchandise, the whole property, except the thirty-nine cases of merchandise, was condemned, as lawful prize to the captors, at a special District Court held on the 23d of June, 1813.

The thirty-nine cases of merchandise were claimed by Mr. *John Tappan*, a native citizen of the *United States* domiciled at *Boston*, who in his affidavits of claim asserted, that he verily believed the same merchandises were purchased in *England* by his agent Mr. *John Gregory* (who is a merchant, domiciled in *England*) and shipped by him, on account and risk of the claimant, on board of the *Diana*, without having previously received from the said claimant any advice or instructions whatsoever, as to the time or manner, in which the said merchandises were to be shipped. In farther support of this claim the affidavit of Mr. *George Searle* was introduced, in which the deponent states his knowledge of the actual agency of *Gregory*, and certain other facts and information, from which he infers, that the property claimed belonged to Mr. *Tappan*.

At the time of interposing the claim, Mr. *Tappan* prayed for a delivery of the property on bail, which, after appraisalment, was granted by the Court. The claim was then continued for farther proof, and a commission, as it should seem, was awarded by the Court, to take the testimony of witnesses in the enemy's country, in support of the claim. At a special term held in December, 1813, the claim was farther heard upon the original evidence, and upon certain letters and papers then produced by the captors, and admitted by the Court, as part of the original letters and papers found on board at the time of the capture, and upon an admission made, for that trial only, by the captors, that the property belonged to Mr. *Tappan*, as claimed. Upon the hearing, the District Court awarded a sentence of res-

titation, from which sentence the captors appealed, and upon that appeal the cause came before this Court.

The opinion of the Court was delivered as follows, by **STORY, J.**—

It is not easy to extract from the record now before the Court a perfect state of the whole case, because no papers have come up, except such as were deemed applicable to this particular claim. As far, however, as the obscure lights of the record, and statements at the bar admitted to be correct, will carry us, it is difficult to conceive a cause more irregularly conducted.

In the first place, it appears, that all the ship's papers and documents were not in the first instance lodged in the registry of the court. This was a very great irregularity. It is the duty of the captors, by the general law of prize, immediately upon arrival in port, to deliver upon oath to the registry of the court, all papers found on board the captured ship. This duty is enforced by the general instructions of the executive in the most positive manner. A strict adherence to it is expected on all occasions; and every deviation will be watched by the Court with uncommon jealousy. It is not for the captors to select such papers, as they may deem important, and present them in the cause. Infinite mischiefs and inconveniencies might result from such a course. It would afford temptations to improper suppression of papers, and jeopard the rights, not only of citizens, but of neutrals. In the present case, the papers, which were omitted to be produced, had a most material character. It is said, as an apology, that all the papers were in the first instance produced to the District Court, and were deemed not properly to belong to that Court, but to the captors, and therefore were returned to their custody. If this be true, and it is not denied by

the parties, the irregularity is certainly excusable ; and in all probability it was this circumstance, that induced the Court below to admit the papers on their last production. I trust, that hereafter it will not be a matter of doubt, to whom the custody of prize papers belongs. The court of prize has a right, and I will add, an exclusive right, to the custody of them.

Another irregularity was the delivery on bail of the property claimed by Mr. *Tappan* ; a delivery, which, from the proceedings in the case, appears to have been considered as a matter of course. I take the practice of the prize court to be, not to deliver property on bail, until after a hearing of the cause, and then only in cases, where the claimant shews a *prima facie* title, which may ultimately entitle him to restitution. And, if the property be ultimately destined for sale in the country, where the court sits, there is not generally any strong reason for a delivery on bail after appraisement. A much more correct and equitable course for all parties would, in such case, be an order of sale, and a deposit or delivery on bail of the proceeds. It is a matter of public notoriety, that appraisements are extremely inaccurate, and unsatisfactory. And I do not think, that a court can be too strict in guarding against applications of this sort in prize proceedings. Here the application was made upon the ground, that the goods were liable to deterioration, the very case, in which a prize court usually orders a sale under a perishable monition.

The claim too of Mr. *Tappan* was in total opposition to all the papers and preparatory examination. The ship and cargo were documented as British property, bound from one British port to another British port, nine months after the declaration of war. The papers respecting the shipment now before the Court clearly evince, that it was made on account or risk of Messrs. *Forsyth, Black and Co.* of *Halifax*. There is not the slightest intimation of any

interest in any other persons. Now I take the general rule to be, that no claim shall be admitted in opposition to the depositions and the ship's papers. It is not an inflexible rule, for it admits of exceptions; but on examination it will be found, that those exceptions stand upon very particular grounds, in cases occurring in time of peace, or at the very commencement of war, and granted as a special indulgence.¹ But in times of known war, to admit claims in opposition to all the preparatory evidence and papers, to enable parties to assume the enemy's garb for one purpose, and throw it off for another, would be holding out an invitation to frauds, and subject the Court to endless impositions. The rule can never be relaxed to such an extent without prostrating the whole law of prize.

And how was this property to be proved in the claimant in opposition to all the evidence on board of the ship? By the affidavit of the claimant, and by the testimony of the shippers, or consignees, under a commission sent into the enemy's country. The very parties, who are without dispute enemies, are to be permitted to devert themselves of property documented as their own, by swearing a transfer to a neutral or friend, and in that way extract it from the law of prize. A more simple or more effectual mode of eluding the rights of captors could not well be devised. If successful in this instance, (I mean no imputation on the present claimant) it could not well fail of success in every other. The issuing of a commission to take evidence in the enemy's country was also of itself an irregularity, and contrary to the established practice of the prize court.²

On the whole, I am entirely satisfied, that the claim of Mr. Tappan, standing, as it does, in direct opposition to all

¹ *The Vrow Anna Catharina*, 5 Rob. 15.—*La Flora*, 6 Rob. 1.

² *The Magnus*, 1 Rob. 31.

the papers and preparatory examinations, ought, even if he had been a neutral, to have been rejected *in limine*.

But there is another view, which is so decisive against his claim, that it is difficult to perceive in what manner it could ever have been sustained. Mr. *Tappan* is an American citizen domiciled in *Boston*, and now asserts an interest in an enemy's shipment made nine months after the war, in a trade between the enemy's ports. If there ever was a case, in which there could be no doubt that the traffic was illegal, it seems to me to be this case. Upon what pretence can an American citizen, after full knowledge of the war, claim to be rightfully engaged in a commerce with the public enemy, and in a trade too peculiarly his own, a trade between the mother country and its colony? After the decisions of the Supreme Court in the *Rapid*,³ the *Sally*,⁴ and the *Alexander*,⁵ it would be useless to discuss the general doctrine of the illegality of a trade with the enemy. It is too plain for argument, that Mr. *Tappan's* claim must be rejected, even if his proofs of property were incontestible, as he must be deemed to be engaged in a traffic reprobated by the law; and he can never found a claim for restoration by shewing his own illegal conduct.

Under these circumstances, where Mr. *Tappan* had neither a legal nor a documentary title to the property, it is difficult to perceive the ground, upon which a delivery on bail was allowed. The bail bond, (it should have been a stipulation) is also incorrect. The terms of it, taken strictly, are inapplicable to the case of a decree of condemnation in an appellate court, and it would require uncommon astuteness to fasten a different construction on the language. Until I saw this record, I had presumed that the proceedings

³ 8 Cranch, R. 155.

⁴ 8 Cranch, R. 382.

⁵ 8 Cranch, R. 169.

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in prize causes, in the first circuit, had at last assumed an uniform regularity. And, with the highest respect for the learned Judge of the District Court of *Maine*, I have felt it a publick duty to notice irregularities, which affect the rights of parties, and introduce so many embarrassments into the prize proceedings.

An objection has been urged by the claimant's counsel against the Court's proceeding to adjudication in favour of the captors, upon the ground of the irregular conduct of the captors, in omitting to bring in all the original papers at the first hearing. It is a sufficient answer to that objection, that the papers produced at the first hearing contained sufficient proof of enemies' property, and the claimant's own affidavit is decisive against his claim. It is not for one, who has no legal title before the Court, to moot difficulties. If the captors fraudulently suppress papers, the Court, in the exercise of its own functions, will take care that they shall derive no benefit from such conduct; but I am yet to learn, that the mere omission to produce papers, by mistake or negligence, especially excused as it is in the present case, is a forfeiture of their rights under the capture. It may induce the Court to suspend judgment, to call for exact information and search with rigorous jealousy; but something more should appear, than mere error, to call forth such penal consequences, supposing it were in the power of the Court to apply them.

I am for reversing the decree of the District Court, and condemning the property claimed, as good and lawful prize to the captors. As the District Judge concurs in the opinion, let a decree be entered accordingly.

Decree reversed. Condemned to the captors with costs and expenses.

After the decree of condemnation, *Pitman* for the captors moved the Court for a monition to the claimant to bring into Court, on oath, an account of the sales of the goods, and to pay the proceeds of the sales into Court instead of the appraised value of the goods, upon the ground that the property ought not to have been delivered on bail, and had been sold by the claimant, within a few days after the appraisement, for \$ 10,000 more than the appraised value.

By the Court. Without meaning to say, that in no case the Court ought to grant a monition to the effect prayed for, we shall deny the present application. Cases of gross fraud, and perhaps other cases may exist, in which it would be proper to order the whole proceeds into Court, notwithstanding a delivery on bail. We shall issue a monition to the party to pay into Court the appraised value pending the term. Although he has claimed an appeal to the Supreme Court, which will be allowed on filing the proper security, we think that the circumstances of the case require the Court to lay its hands on the property. Where the title of the claimant is so palpably unsound, he ought not to profit by any delays incident to the prosecution of an appeal.

The appeal was abandoned.

Pitman for the captors.

G. Blake and Prescott for the claimant.

ANONYMOUS.

ANONYMOUS.

The marshal may have an attachment, to enforce the payment of his fees of office, against suitors in the court.

So against an endorser on the writ, who by the *lex loci* is liable to respond the costs.

STORY, J. This is a motion made by the marshal for an attachment against the defendant, who is an attorney of this Court, to compel the payment of his fees for the service of sundry writs brought in this court by *Susanna Cunningham*, a citizen of the state of *New York*, against *Harrison G. Otis* and others, which writs were endorsed by the defendant, and were dismissed at a former term of this Court.

It has been contended, that this is not a proper process to compel payment of the fees due to the marshal. But on the authority of *Caldwell vs. Jackson*, in the Supreme Court,¹ we are satisfied, that an attachment may issue to compel the payment of the fees due to officers of the court for the performance of their official duties. And this seems reasonable, inasmuch as the marshal is compellable to perform these duties, and as an officer of the court, a similar process lies against him to enforce the performance.

As the affidavits prove the substantial facts, which are not denied, the only remaining question seems to be, whether the same process, which would lie against the party to compel payment of fees, can be maintained against his attorney, who endorses the writ, and thereby becomes liable, under the statute of *Massachusetts* of 30th of October, 1784, s. 11,² to the payment of the costs of the suit in case of the avoidance or inability of his principal. As the principal resides without the state, and due applica-

¹ 7 *Cranch, R.* 276.

² 1 *Mass. L.* 206.

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tion has been made to his attorney in the suits, to obtain payment, it is a sufficient avoidance within the meaning of the statute, even supposing that such avoidance be necessary, where the party plaintiff is not an inhabitant of the Commonwealth. We think also that this case is fairly within the equity of the statute, though perhaps not within its words, which seem confined to the payment of the costs of the defendant. The uniform practice of this Court has been, to require an endorsement on the writ by the plaintiff or his attorney, if resident within the Commonwealth, or by some other responsible person, if the plaintiff were resident without the Commonwealth, according to the statute, and with the express understanding, that such endorsement rendered the endorser liable to the payment of the costs of the suit in default of his principal. Where the principal resides without the state, it must be considered, that the endorser makes himself directly responsible to the officers of the court for their official fees—and indeed in point of practice, unless in special cases, the officers of the court have looked to the attorneys upon record for the payment of the fees due for services performed at their request.

We certainly feel no desire to disturb this honourable confidence between all the officers of the court. And in the present case, as the attorney upon record is the endorser of the writ, and must from the non-residence of his principal be considered as making himself directly liable for the marshal's fees, upon this ground we hold, that the rule for an attachment ought to be made absolute.

Rule absolute.

J. T. Austin for the marshal.

CIRCUIT COURT OF THE UNITED STATES,

RHODE ISLAND, JUNE TERM, 1814, AT NEWPORT.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
 { Hon. DAVID HOWELL, District Judge.

THE LORD WELLINGTON, SANDFORD, &c. CLAIMANTS.

If an American vessel take on board a cargo from an enemy's ship, under the pretence, that it is ransomed, it is an illegal traffic, for which, by the law of war, she is liable to condemnation as prize of war, and may be seized on the return voyage.

THIS was an information filed in behalf of the *United States* by the District Attorney, claiming the sloop *Lord Wellington*, as forfeited to the *United States* for an alleged trading with the enemy. From the facts admitted by the claim, or proved by the evidence, it appeared that the sloop, on the 11th of December, 1813, cleared out from *Newport* for *New York*, and a manifest was then produced at the customhouse, and sworn to by the master, stating the cargo on board to be 700 tons of iron, and six tons of burr stone. In fact there was no cargo on board. The sloop sailed from *Newport*, went along side of the British squadron in *Long Island Sound*, and there received the iron on board, which was thereupon transported to *New*

Lord Wellington.

York, and upon her return to *Newport*, about the 4th day of January, 1814, the sloop was seized by the commander of the revenue cutter, as prize to the *United States*.

The special claim filed by the claimants admitted, that the cargo had been taken on board, as above stated; and averred, that it had been some time previously captured from another American vessel, the *Amelia*, bound from *New York* to *Newport*, and was ransomed by the American owners from the British captors under a special agreement, and the sloop *Lord Wellington* was engaged by the owners to pay the ransom and take the iron back to *New York*.

STORY. J. This is a very clear case of trading with the enemy. Whether the facts stated in the special claim are true or not, is not now material to be considered. It is not competent for American citizens to engage in this sort of traffic with the public enemy. Even admitting the ransoming of captured property to be legal, it cannot be admitted to be made at any distance of time, and by any new voyages undertaken for this especial purpose. There would be no end to such intercourse; or to the dangers, which would thereby arise to the country. No intercourse of this kind can be carried on, except by the express permission of the government. I will not stop to consider, whether the claim can be supported in point of fact. It comes with no very good grace, after an inception of the voyage by a most gross and palpable perjury in swearing to a cargo, which was not on board. This was a fraud, which deserves no countenance, and can be sustained by no apology.—I condemn the sloop to the *United States*.

Robbins for the *United States*.

Burrill for the claimants.

CIRCUIT COURT OF THE UNITED STATES,

NEW HAMPSHIRE, OCTOBER TERM, 1814, AT EXETER.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
 { Hon. JOHN S. SHERBURNE, District Judge.

THE SOCIETY FOR THE PROPAGATION OF THE GOSPEL, &c. vs.
WHEELER AND AL.

If a foreign corporation, established in a foreign country, sue in our courts, and war intervene between the countries, pending the suit, this is not sufficient to defeat the action, unless it appear on the record, that the plaintiffs are not within any of the exceptions, which enable an alien enemy to sue. Of the nature and effect of a plea of alien enemy. There is no legal difference as to the plea of alien enemy between a corporation and an individual.

The act of *New Hampshire* of the 19th of June, 1805, allowing to tenants the value of improvements, &c. on recoveries against them, so far as it applies to past improvements, is unconstitutional.

Enter sur disseisin.—In the writ, the demandants, describing themselves as “the Society for the propagation of the Gospel in foreign parts, a corporation duly constituted and established in *England*, in the dominions of the King of the United Kingdoms of *Great Britain* and *Ireland*, the members of which society are aliens and subjects of said King,” demand of the tenants, who are all citizens of the state of *New Hampshire*, seisin of a tract of land in *Westmoreland* in said district of *New*

Hampshire, which they aver to exceed in value the sum of five hundred dollars ; and they count upon their own seisin, and a disseisin by the tenants, within thirty years.

At the May Term of this court, 1808, the tenants pleaded the following plea :—

“ And the defendants come and say, that this court ought not to take cognizance of the said action, because they say, that said action is sued by and in the name of a supposed corporation or body politick, supposed to be created by a law of a foreign state, and is not sued and commenced by any citizen or subject of any foreign state, against them the said defendants, and this, &c. Wherefore they pray judgment, whether this court will take further cognizance of this action, and for their costs.”

The demandants replied as follows :—

“ And the said Society say, that this court ought to take further cognizance of their action aforesaid, notwithstanding any thing by the said *John Wheeler* and others in their plea aforesaid alleged, because the said Society for the propagation of the Gospel in foreign parts say, that at the time of the commencement of the said action, they were, and still are, a corporation constituted and established in *England*, in the dominions of the said King of the United Kingdoms of *Great Britain* and *Ireland*, and the members of said Society then were, and still are, aliens, and subjects of the said king, as by their writ aforesaid is supposed, and this they pray may be inquired of by the country.”

To this replication there was a general demurrer, and joinder in demurrer.

The Court having overruled the plea to the jurisdiction, the tenants, at the November Term, 1810, pleaded the

general issue, *non disseisiverunt*, which was joined by the demandants.

At the May Term, 1814, the tenants severally filed claims under the third section of the statute of *New Hampshire* of the 19th of June, 1805,¹ in which they alleged a seisin and possession of the demanded premises in themselves, or those, under whom they claimed, for more than six years before the commencement of the present action, and that by buildings and improvements the value of the land was increased in a certain sum, wherefore they prayed that the jury might, if they found a verdict for the demandants, inquire and ascertain the said increased value, and that no writ of seisin or possession should issue, until the demandants should pay into the hands of the clerk for the use of the tenants, such sum as the jury should so assess.

At the October Term, 1814, the jury found a verdict for the demandants, and they also found the value of the improvements made by the tenants severally.

The demandants moved for a judgment on the verdict, notwithstanding the statute, and the tenants moved in arrest of judgment, upon the ground, that the demandants appeared by the record to be alien enemies.

These motions were argued by *Freeman* for the demandants, and *Richardson* for the tenants.

Freeman, on the motion in arrest of judgment. The demandants are entitled to judgment, unless their disability to sue appears on the record. The only ground of objection is contained in the description, which they give of themselves, for the purpose of giving jurisdiction to the court, viz. "The Society, &c. a corporation constituted in *England*, in the dominions of the King, &c. the mem-

¹ *Laws of N. H.* 170, ed. 1815.

bers of which society are aliens and subjects of said King."

If from this description, connected with other things of which the Court are bound to take notice, it appears that the demandants cannot have ability to sue, judgment must be arrested; otherwise, they are entitled to it on the verdict.

Two grounds of disability may be pretended:—

1. That it appears, by the demandants' own shewing, that at the commencement of the suit they were aliens, and so could not sustain a real action.

2. That, since this action was brought, they have become *alien enemies*, and therefore disabled to *sue any action*.

As to the first ground, it is certain, that, at the commencement of this action, British subjects, whether resident in this country or in the British dominions, might sue for, and recover, all lands, which they held previous to *Jay's treaty*, in the same manner as citizens, and this, whether disseised before or after the treaty. They are entitled to sue in the *United States'* courts, and the allegation of alienage in the writ is necessary to give the court jurisdiction.

It does not, therefore, appear from the writ, whether the demandants were disabled to sue or not. And as to the merits of their claim, no new writ or other form of declaration is given them by the treaty, but the ordinary form of remedy for citizens. The count is simply on the seisin of the demandants, and disseisin by the tenants, in the same form, as though the suit were in the State Court, where no such allegation is necessary for the purpose of jurisdiction.

The demandants are not bound to anticipate, nor can they anticipate or forestall the defence of the tenants,

and the whole course of the pleadings, nor would it avail them, should they attempt it.

But much less could they be bound in their declaration to anticipate a defence, which might arise after the action was commenced. If therefore by any possibility, the demandants might, *consistently with this writ*, reply sufficient matter to avoid the defence of *alien enemy*, if pleaded; the tenants were bound to plead it, and having answered to the merits, they must plead the new matter *puis darrein continuance*, else the disability is waived, and they are estopped to set it up afterwards.

It is not denied, that the Court *ex officio* must take notice of the declaration of war by Congress, as indeed in *England* they must of the King's proclamation. No doubt, it is a publick act. But, admitting all this, and that the members of the corporation, at the commencement of the suit, were and still are subjects of *Great Britain*, in such sense as is necessary to give this court jurisdiction, it does not necessarily follow, that they are alien enemies in such sense, as to disable them from sustaining this suit.

In their corporate capacity, they have no such political relations, as to denominate them *corporaliter* a subject or an alien.² The disability then, if any, must result from the character of the individual members.

But although alienage of the members of a corporation may be averred for the purpose of jurisdiction, it does not follow, that they can be considered as alien enemies, so as to destroy rights.

The plea of *alien enemy* cannot apply to a corporation aggregate, at all. If it could, it would follow, that a single stockholder of one of our banks residing in an enemy's

² 5 Cranch, R. 60, *Hope Ins. Company vs. Boardman*.

country would disable the corporation to sustain any action in our courts. So is the law as to joint partners.³

Co. Litt. 129 a. is express, that alienage is no plea to an action, real or personal, by a corporation, because they sue in their corporate capacity and *en autre droit*.

The same doctrine is laid down in *Bacon's Abr.* and applied to an *alien enemy*. And an alien enemy, for the same reason, viz. because he acts *en autre droit*, may sue as executor or administrator.⁴ Yet it might be a good plea, that the testator or intestate, at his decease, was an alien enemy.⁵

From these authorities it would seem, that the law rather regards the person represented or the use, than the party on the record. The law will protect the interest of an innocent assignee, or *cestui que trust*, in a *chose in action*.⁶ On the principle of these cases, it would seem, that the assignee of a judgment, or other *chose in action*, would not be barred from suing in the name of a foreigner by the breaking out of war.

In personal actions the thing is forfeited to the king, and after inquest he may have an action on the contract with an alien enemy for his own benefit. But not when the equitable property is in another. Nor can he have a writ on a disseisin done to an alien enemy, or other real action on his seisin.⁷

The reason of the law is, to prevent the property's being withdrawn from the country, and going to increase the

³ 3 B. and P. 113, *M'c Connel vs. Hector*.

⁴ 1 *Bac. Abr. Alien, D.—Abatement*, B. 3. 1 *Salk.* 46 pl. 1, 2. 1 *Str.* 282. 1 *Com. Dig. Alien. C.* 7. *Cro. El.* 684, *Brooks vs. Philips*. *Cro. Car.* 8, *Caroon's case*. 3 *Burr.* 1739, 1741. *Cro. El.* 275 *Wingate vs. Mark*.

⁵ *Skin.* 370.

⁶ 1 *T. R.* 609, *Winch vs. Keeley*.—6 *T. R.* 23, *Brandon vs. Nesbit*.

⁷ 1 *Tuunt. R.* 29, 33, *Eng. ed.*

resources of the enemy. It does not, therefore, apply to the case of lands, which cannot be withdrawn. Nor could it apply to a case of *trust*, where the proceeds of the suit must be applied to charitable and religious uses. There is nothing hostile in the purposes of this corporation. The Government of the *United States* have not made war on the christian religion. There is no case, in which the rule "*cessante ratione cessat et ipsa lex*" could apply more strongly.

But, even in the case of individuals suing for their own benefit and in their own right, alienage for the purposes of jurisdiction, and the question of alien enemy to disable the party, are governed by very different rules.

Alienage for the purpose of jurisdiction is opposed to *citizenship*. Persons *inhabiting* here, not having political rights as citizens, are aliens, and may sue in the federal courts.*

But on the question of *alien enemy* the domicil settles the character. It is uniformly so held in prize causes.*

The matter alleged in the writ would clearly be insufficient in a plea of alien enemy, if any such plea might be allowed in the case. This plea requires the greatest strictness.

The constant inclination of courts has been to narrow this ground of objection. It is a defence not favoured in law. It is only temporary in its nature; it is considered as a dilatory plea; as being against right; and of all pleas the most odious.†

Non constat, that in this case every member of the corporation is not now, and ever since the commencement of

* 4 *Dall.* 353, *Hollingsworth vs. Duane*.

• 5 *Rob. R.* 96, *La Virginie*. *Camp. R.* 482, *O'Mealy vs. Wilson*.

• 8 *T. R.* 166, 71. 2 *W. B.* 1326. 13 *East. R.* 332. 10 *East. R.* 336. 1 *B. and P.* 165, 169, 170. 9 *East. R.* 521.

the war has been, commorant here. They sue in their corporate capacity, and *en autre droit*. They sue for their lands in a real action, to which case the plea of alien enemy has never been extended, and the reason of it does not apply. And so far as the Court can determine from the name of the corporation, they sue for property as being devoted to a benevolent and pious use, not less beneficial to this country, than to any other, and wholly unconnected with any hostile or commercial purposes."

Freeman, on the motion for judgment. To the defendants' claim of compensation for their improvements, the plaintiffs object the 2d, 3d, 12th, 14th, and 23d articles of the bill of rights in the constitution of *New Hampshire*, art. 1, section 10, of the constitution of the *United States*, and art. 5 of the amendments.

They contend :—

1. That the statute relied on by the defendants,¹¹ so far as it might be construed to affect this action, is void, being repugnant to the provisions of the constitution of *New Hampshire* above cited, as well as to the constitution of the *United States*, and to the principles of natural justice.

2. The act does not extend to suits in the *United States'* courts, nor bind those courts.

3. Nor to suits of foreigners; at least, of foreigners suing in the *United States'* courts.

4. The claims are insufficient, by reason of their uncertainty in respect to setting out the defendants' title, the persons of whom purchases were made, and the consideration.

¹¹ The reporter regrets, that not having been present at the argument on this point in behalf of the tenants, he is unable to insert it.

¹² *Act of New Hampshire, 19th of June, 1805. Rev. Laws, 170.*

1. The courts of the *United States*, not less than the state courts, must, when the question arises in a case properly before them, judge of the validity of an act of a state legislature, under the state constitution.¹³

The statute in question may be considered in two points of view :—

1. As conferring a right on one party, and imposing a corresponding liability on the other; or,

2. As regulating a remedy, and prescribing the time and mode of proceeding.

From the verdict of the jury, by which the improved value is assessed, it appears that the demandants, *at the time of passing the act*, had, or would have, a *perfect right* to recover the demanded premises. This was then an absolute and unconditional right to their remedy for the possession, clear of any incumbrance, “freely and without purchase.” Till then there was no legal or equitable liability of the demandants to compensate for the increased value in case of a recovery. The law imputed no wrong, or fault, or laches, to the demandants for not suing within six years. It implied no contract in favour of an adverse possessor, who litigates a just title. It imposed no duty on the demandants. It gave no rights to the tenant. And so destitute even of moral obligation is the claim, that an express promise on such a consideration has been held to be *nudum pactum* and void.¹⁴

Such then being the rights of the parties, laying aside the constitutional objections, a statute must be very clear and unequivocal, to impair those rights on account of any facts or circumstances, which happened before the passing of the statute; for it is a general principle, that laws should

¹³ 2 *Dall. R.* 308, *Vanhome's Lessee vs. Dorrance*. 4 *Dall. R.* 14, *Cooper vs. Telfair*. 2 *Cranch, R.* 272, 276, *Ogden vs. Blackledge*. [*New Jersey vs. Wilson*, 7 *Cranch, R.* 164.]

¹⁴ 5 *John. Rep.* 272, 277, *Frear vs. Hardenberg*.

be construed *prospectively*, and not *retrospectively*, so as to take away a *vested right*. The case should not exist, at the passing of a law, upon which the law is to operate.

The *barring*, *defeating*, or *impairing* the recovery of a former right, by a statute, upon a consideration wholly past, is within the same general principle, and equally within the consideration of the constitution, as the *creating* of a new direct liability to an action. The principle of this statute would have been no worse, had it provided, that the tenant should have his action for such past improvement, in consideration of the prior purchase and possession, nor had it said, that such tenant, *then in possession*, should hold the land absolutely forever. The right of recovery was before perfect and unconditional. Now, on the defendants' construction, it becomes, *by the mere force of the statute*, conditional, and charged with an *incumbrance*, for that, for which there was before no legal or equitable right.

It is equally inadmissible to extend the statute to a case, where any part of the six years possession was before the act passed.

A statute of limitation is different; as it relates merely to prosecuting the remedy, and always contains an alternative of bringing suits within a certain time to run after the act passed. Here is no time allowed to bring a suit, so as to avoid the charge of improvements, unless the act be wholly prospective. An action brought the next moment after the act was passed stands on the same ground in this respect, as one brought at any time within six years afterwards, for there can be no division of the time.

It is repugnant to the very notion of a law, as defined by elementary writers, that it should be considered a rule for *past cases*.¹⁵

¹⁵ 1 *Black. Com.* 44, 45, 46. 1 *Burlamaqui*, 99, 101, 102, *ch.* 10, § 2, 3, 5, 6, 7, and page 104. 2 *Burl. part.* 3, *ch.* 1, § 2, § 4. *Puff. B.*

A few authorities will shew, that in analogous cases such construction of statutes, as that under which the defendants in this case claim, has been reprobated, as *against natural justice*.¹⁶

2. Considering the statute in the other view, *viz.* as regulating the remedy, and prescribing the time and mode of proceeding, the same constitutional objections apply with equal force, and the defendants' construction of the act is doubly guarded against by those provisions, which relate to the protection of property, and the right of a free and certain remedy by law for all injuries.

II. But this statute, being directory only to courts, and prescribing a certain mode of proceeding, extends no farther than the *state courts*, and does not bind those of the *United States*.

The 34th section of the judiciary act,¹⁷ (passed September 24, 1789,) does not extend to this case. There is a marked distinction between those statutes of the several states, which are to be considered as measures of right and rules of property, which Congress has no authority to dispense with, and such as regard only the *time, form and mode* of pursuing remedies, and of process and proceedings in their courts. This distinction seems to be observed in the diffe-

1, ch. 6, § 7. B. 7, ch. 6, § 2. Bract. L. 4, fo. 228. 2 Inst. 292. 7 John. R. 502, 504. Cod. L. 1, T. 14, l. 7. "Leges et constitutiones futuris certum est dare formam negotiis, non ad facta preterita revocari; nisi nominatim, et de preterito tempore, et adhuc pendentibus negotiis, cantum sit."

¹⁶ Grotius, J. B. & P. Lib. 2, cap. 10, § 1, 5. Lib. 3, cap. 14, § 7, 2, cap. 20, § 7, 9, 10. 2 Dall. Rep. 304, *Vanhorne's Lessee vs. Dorrance*. 3 Dall. R. 386, *Calder & ux. vs. Bull & ux.* 2 Cranch, R. 272, 276, *Ogden vs. Blackledge*. 3 Caines N. Y. R. 69, *Jackson ex dem. Sherwood vs. Phelps*. 3 Cranch, R. 399, 403, &c. *United States vs. Heth*. 4 John. Rep. 78, 75, 76. 5 John. Rep. 139, 142. 4 Burr, 2460. 7 John. R. 477, *Dash vs. Van Kleeck*.

¹⁷ 1 U. S. L. 74.

rent statutes of the *United States*, which have reference to the state laws.

Statutes of the first class only are embraced in the 34th section of the judiciary act. This provision recognises the laws of the states *for the time being*, in cases where they apply, *as rules of decision*, &c.

On most questions, that arise in the trial of causes, the state laws must be the *only rules of decision*. Such are those concerning the attestation and effect of *wills*, course of descents, distribution of estates, modes of conveyances, contracts, and generally *whatever regards the internal police and government of the state*. Respecting such matters, Congress has no legislative power, and it was probably for the removal of doubts upon this subject, and to prevent an extension of the powers of the General Government by implication, and especially to allay those jealousies, which were assiduously fomented on its first adoption, that this section of the judiciary act was introduced.

That this provision was not intended to extend at all to forms of process and proceedings in the federal courts, and those incidents generally, which it properly belonged to Congress to regulate, is evident from the act to regulate process, which passed a few days afterwards, as well as from various other provisions of the statutes of the *United States*.

The *United States'* Government may establish their own limitation acts for proceedings in their courts, and, if they choose, make them uniform through the *United States*. A new state limitation act, as to the time of bringing suits, would not apply to suits in the *United States'* courts, unless expressly adopted by the general government. The limitation of penal suits is different under the *United States'* laws, and those of the states. In the *United States*, it is *two years*, in the State of *New Hampshire* but *one*. The limi-

tation of writs of error in the *United States'* courts is also different from that in the state courts.

The courts of the *United States* are not governed by those statutes of the several states, which regulate costs, bail, process and trials, juries, challenges, &c.

The words of the former statute regulating process, &c.¹⁸ are "forms of writs, and process, and modes of proceeding in the courts of the *United States* shall conform to such, as are now used and allowed in the Supreme Courts in the respective states, &c."

The existing statute regulating process¹⁹ adopts such form of writs, execution, and other process, and forms and modes of proceeding in common law suits, as were then used in the *United States'* courts in pursuance of the former act. The time and mode of remedy, &c. follow only such state statutes as were then in force, or else the common law.

So in the statute as to returning jurors,²⁰ such mode, as then used, is adopted. There are also special provisions, as to writs of error, stay of execution, new trials, judgment on bonds with penalty, &c.²¹

The form of remedy and course of judicial proceedings, and the time when the action may be commenced, follow not the *lex loci contractus*, nor the law of the place where the right or liability accrues, but that of the jurisdiction where the remedy is prosecuted.²²

This distinction as to the objects of the state laws, which goes to exclude the case in question from the purview of

¹⁸ Sept. 22, 1789, 1 U. S. L. 146.

¹⁹ May 8, 1792, 2 U. S. L. 103.

²⁰ 5 U. S. L. 194.

²¹ See also § 15 of the judiciary act, and the provisions respecting prisoners for debt, 3 U. S. L. 335. 5 U. S. L. 6.

²² 2 Mass. R. 84, *Pearall vs. Dwight*.

the 34th section of the judiciary act, appears to have been insisted on with effect in the trial of Judge Chase.²³

III. As to the application of the law to Foreigners, it is to be observed, that whatever the state sovereignty may direct respecting its own subjects, yet in cases where the rights of foreigners are concerned, the law of nature and of nations is paramount to the municipal or common law, or rather may form exceptions and restrictions to general rules.

The law of nations in its full extent, where applicable, is part of the common law of every country.²⁴

It may justly be questioned, whether any one of the state sovereignties has authority to divest foreigners of their rights, or destroy their remedies, as is attempted in this case.

A regulation respecting remedies, and proceedings in the state courts, *where citizens only are bound to sue*, might, from the different organization of the federal courts, and the course of their proceedings, and the different situation of their suitors, operate very unequally, if applied to them. For example, a very short term of limitation for bringing suits, as in this case for paying betterments, might defeat the rights of foreigners altogether, without any laches on their part.

The federal judiciary was intended to protect the rights of strangers against local and state partiality and injustice.

IV. As to the fourth point, on the sufficiency of the defendants' claims, I shall submit it to the Court, if they should come to it.

Richardson, for the tenants. It is not denied, that the legislative power is limited by the constitution, nor that the

²³ *Evans's trial of Judge Chase*, Appx. p. 4, 5, *Articles 5 and 6. Answers*, p. 31, &c. *Randolph's reply*, 5th Art. *Harper's opening*, p. 59. *Clarke*, 115. *C. Lee*, 164, p. 263, and Appx. 62, the vote.

²⁴ 3 *Burr.* 1480. 4 *Burr.* 2016.

court have a right to declare an act, which is contrary to the constitution, void.

But in the first place it is denied, that any right secured by the 2d, 3d, or 12th articles of the *New Hampshire* bill of rights, or by the fifth article of the amendments of the constitution of the *United States*, is violated by this act.

What are the facts? The defendants, supposing they had acquired a legal title to the land, having paid a valuable consideration for it, entered, and at great expense and labour increased the value of the land, by buildings and improvements made thereon. To whom do these improvements and buildings belong? Every man has a right to the fruits of his own labour. By this rule the buildings and improvements belong to the defendants. How do the plaintiffs derive their right to them? They own the lands; these improvements cannot be severed from the land; they can recover the lands and these improvements as incident to them. But this course of reasoning shews not a vested right to the improvements, but the mode in which a vested right may be acquired. When the plaintiffs shall have recovered the land, they will then, and not before, have a vested right in the improvements. This distinction is clearly recognised in the case of *Taylor vs. Townsend*.²⁵

It is not true, that whatever is annexed to the freehold becomes immediately the property of the owner of the land, as is evident from the right of a lessee to remove certain buildings by him erected.²⁶ There is, in principle, no distinction between improvements, that can be severed and removed from the land, and those which cannot. The man, who turns unproductive low land into productive meadow, is, in equity and justice, as much entitled to the

²⁵ 8 Mass. R. 411.

²⁶ Bull. N. P. 34.

increased value, as he who erects a building, is entitled to that building, although, as the law stood before this act, the one had no remedy to enforce his right, and the other had a remedy in certain cases. The design of the law, against which the plaintiffs object, was to provide a remedy, where none existed before. It is founded upon the supposition, that the tenant has a vested right to the improvements, he has made, as the fruit of his own labour, and that the owner of the land has no right to them. If the broad principle be assumed as true, that whatever improvements are made upon land become immediately the property of the owner of the land, by a vested right, whether he is in possession or not, the doctrine laid down in *Buller's Nisi Prius* 34, and the principles of the case of, *Taylor vs. Townsend*, would be a violation of the constitution of *New Hampshire*; and yet both cases are understood to be law here. What right of the plaintiffs is violated? Before this act they had a right to the land; they had a right to a remedy, to recover the land with all the improvements. These rights they still retain. The legislature, in this act, say, you may have your land, you may have your remedy to recover it, but you shall not acquire a right to the improvements made upon it by an innocent tenant, through a mistake of his rights, till you have paid him for those improvements. You shall not turn him out of possession, and enjoy the fruits of his labours, till you make him a compensation. If this be a violation of an essential natural right, it is apprehended that by the same course of reasoning it may be shewn, that the maxim in equity; "you shall do justice before you receive it," is inequitable.

There is no novelty in making a distinction between the value of the land at any particular time, and the improve-

ments afterwards made upon it, as appears from the opinion of *C. J. Kent*, in *Pitcher vs. Livingston*, 4. *John. R.* 17.

With regard to the objection, that this act violates the first article of the bill of rights, the defendants apprehend, that the history of that article shews, that it was not intended to apply to a case of this kind. The clause of that article, on which the plaintiffs rely, has always been understood to have been copied from the "*nulli vendemus justitiam*" of *magna charta*, which was certainly intended to apply to a very different case.²⁷

But it is said, this law, as applied to this case, is a retrospective law for the decision of a civil cause. Before discussing this question, it seems necessary to ascertain, what is a retrospective law within the meaning of this article in the bill of rights. It is apprehended, that the opinions expressed by the court in *Calder vs. Bull*,²⁸ and *Dash vs. Van Kleeck*,²⁹ authorize the definition, that a retrospective law is one, that takes away or impairs rights acquired by existing laws. It is believed, no other definition can be found.

Now it is denied that this act, applied to this case, takes away or impairs any vested right. It is denied, on the grounds before stated, that the plaintiffs ever had any vested right to the improvements made by the defendants upon the land. Under the law, as it stood before this act, they might have acquired such a right, but they never did acquire it, and the statute only declares, they shall not now acquire it without making compensation. The statute secures to the defendant a vested right, which justice requires should be secured to him. The case cited from 5 *John.* 272, does not apply to this case. There the tenant went upon the land, knowing it to belong to another. In this case, the tenants entered innocently and by mis-

²⁷ *Sull. Lect.* 272.²⁸ 3 *Dall.* 386.²⁹ 7 *John. R.* 477.

take, and it is humbly submitted, that unless the plaintiffs had a vested right to acquire property from the defendants against justice and equity, there is no foundation for this objection.

- The other objections made by the plaintiffs' counsel require no answer.

Freeman, in reply. The facts assumed by the defendants' counsel, viz. "that they, supposing they had acquired a legal title to the land, having paid a valuable consideration, entered, and at great expense and labour increased the value of the land by buildings and improvements," are not warranted by the defendants' claim, nor by the case provided for by the statute. It was not necessary, in order to make out the case according to the statute, for the defendants to shew, nor does it at all appear, that the improvements or any considerable part of them, were made by *the defendants* themselves, or by *any* person, who held under a *bona fide* purchase, or any colour of title. But the broad rule, "that every man has a right to the fruits of his own labour," would apply equally well to any case, where a stranger should undertake to manage my affairs without my consent. It never can be contended, that a mere wrong doer, entering wilfully and knowingly on another's land without his consent, without colour of title, and retaining the possession, acquires any right merely by bestowing his labour upon it. But the rule laid down by the defendants' counsel must be maintained in all this extent, in order to prove the defendants' right to the benefit of improvements before the act passed. For it does not appear that the improvements were not wholly made by the original wrong doer, long before any purchase. He, after six years, could have no claim under the statute for compensation, and yet, by his sale, the defendants, it is said, have become entitled to that compen-

sation. And still, as the defendants' cases shew, the purchaser, on eviction, might recover on his warranty the full value at least of the land and improvements, as they were when conveyed to him; so that, in the event, the original wrong doer would have the benefit of the improvements, or else the purchaser would have a double satisfaction.

But put the case, as the defendants' counsel, without any ground, supposes it, that the improvements must have been made by the *bona fide* purchaser, still *he* had no right to compensation before the statute. Such right, at any rate, could be considered as no better than the imperfect one, that a man may have to the charity or generosity of others. It stands on hardly so good a foundation as a mere debt of gratitude. Can the Legislature enforce the discharge of such previous obligations? It is believed they cannot.

Rights of property, as enforced in courts, must not depend on any vague and imaginary notions of natural justice, but on the settled rules of law. These are the great landmarks, which limit the rights of parties, and they must be observed. They settle the questions, what is right? and, What is just? And on this subject, the rule in law and in equity is the same, "*Equitas sequitur legem.*" It is said, that the statute is founded on a supposition, that the tenant has a *vested right* to the improvements he has made, and that the object of the law was, to *provide a remedy* where, it is conceded, none existed before. But it is a maxim of law, that for every *right* there is a *remedy*. Want of right and want of remedy are convertible terms. If any such right existed, there seems to be no difficulty in adapting the existing forms of common law remedies to it. The case in 5 *John*. 272, did not turn on any question as to the form of remedy.

The cases of warranty, &c. have no bearing in favour of the defendants. They respect only the construction and effect of contracts as between the parties and privies.

- The cases cited of buildings, which may be severed and taken away by the lessee during the term, are also inapplicable, and they do not warrant the doctrine inferred from them, "that whatever is annexed to the freehold does not become the property of the owner of the land." The principle of these cases I apprehend to be, that the things *never were* annexed to the freehold, or if they had been so annexed, yet they were *severed* from the freehold or inheritance by the contract of the parties, express or implied, and common usage may be evidence of such contract. The cases of lessees, however, might not be quite so inapplicable, if it could be shewn, that they had a right to compel their landlords to pay for the coppers, buildings, and ameliorations of the soil, by them put up and made on the land, when not stipulated for in the lease.

Every principle of the common law is repugnant to the notion of any such right of the defendants to compensation for their improvements, antecedent to the statute. The improvements themselves, in most cases arising under the statute, are such as would be considered *waste* by the common law, and if made by the tenant of a rightful particular estate, would subject him to forfeit it.³⁰

This notion is repugnant to the law in relation to personal property, in the cases of *accession* and *confusion of goods*, as laid down, 2 *Black. Com.* 404, &c. And *Bracton* in the place there cited, as well as *Co. Litt.*, applies the rule of accession more strongly to real estate.

It is impossible to conceive what is meant by a "vested right to land," and "a vested right to a remedy to recover the land *with all the improvements*," and a vested right, at

³⁰ *Co. Litt.* § 67.

the same time, in the improvements in an adverse possessor. Permit me to have the effect of my vested rights to the land, and to the remedy to recover the land, as it is, with the improvements, and also to keep my money in my own possession, to which I suppose I have also a *vested right*, and my adversary may enjoy such vested right in the improvements as he can.

2. The 14th article of the bill of rights secures a *remedy for every right of property*, as absolutely as the right itself is secured. It is immaterial to the party pursuing his rights, whether he is obliged to pay the purchase money to the government, or to the adverse party.

3. If it be true that, in law, the defendants had no *vested right* to compensation for improvements before the act passed, then it seems to be conceded, that the constitutional objections, both on the articles protecting the rights of property, and on the article prohibiting retrospective laws, are well grounded.

But it is doubtful, at least, whether the defendants' definition of a retrospective law is so perfect, as to comprehend all civil cases, that come within the 23d article. Any law subjecting a person to loss or detriment, or imposing an obligation on him *on a past consideration*, or made to apply to existing cases, is *retrospective*. A law enhancing the measure of damages in civil actions on past cases is equally prohibited by this article, as a law that enhances the punishment of a crime already committed. There can be no doubt, that such a law is *retrospective*, and it makes the case no clearer to compare it with the definition of the defendants' counsel. No vested right is impaired, in the case put, more than there is by the statute now in question. In one case the party's money is recovered from him, *on a past consideration*, in the form of damages. In the present case, he would be compelled by the statute, on such

past consideration, to part with his money, or else lose his land, and either alternative is equally exceptionable.

At the October Term, 1814, in *Massachusetts*, the following opinion was delivered by

STORY, J. This is a writ of entry *sur disseisin*, brought on the demandants' own seisin, and a disseisin by the tenants within thirty years; the writ bears teste on the 22d December, 1807. The tenants, at May Term, 1808, having pleaded a plea to the jurisdiction, which was overruled by the Court, afterwards pleaded the general issue *nul disseisin*: and at the present October Term of this Court, a verdict was found for the demandants; and also the value of the improvements made by the tenants on the demanded premises, pursuant to the statute of *New Hampshire* of the 19th of June, 1805.³¹ After the verdict, a motion was made by the demandants for a judgment on the verdict at common law, and writ of seisin thereon, without any regard whatever to the provisions of the statute of 1805, or the value of the improvements found by the verdict, principally upon the ground, that this statute was unconstitutional. A cross motion was also made by the tenants in arrest of judgment, upon the ground that the demandants were, by their own shewing, alien enemies, and therefore not entitled farther to pursue the present action. These motions have been ably argued, and the decision, which after much deliberation I have formed, will now be pronounced.

And first, as to the motion in arrest of judgment. The demandants are described in the writ, as "The Society for the propagation of the Gospel in foreign parts, a corporation duly constituted and established in *England*, in the dominions of the King of the United Kingdoms of Great

³¹ *Acts* (edition 1805,) p. 395, ed. 1815, p. 170.

Britain and Ireland; the members of which society are aliens and subjects of the said king.” If from this description, and the other facts apparent upon the record, the Court must intend, that the demandants have not a capacity farther to pursue the present action, then the motion must prevail. If, on the other hand, by possibility, and consistently with the facts on the record, such capacity can remain, then judgment must pass upon the verdict for the demandants.

There is no pretence for holding, that the mere alienage of the demandants would form a valid bar to the recovery in this case, supposing the two countries to be at peace; for however true it may be, in general, that an alien cannot maintain a real action, it is very clear that either upon the ground of the 9th article of the British treaty of 1794, or upon the more general ground, that the division of an empire works no forfeiture of rights previously acquired, (and in point of fact the title of the demandants was acquired before the American Revolution) for aught that appears upon the present record, the present action might well be maintained.²² The whole objection therefore must rest on the existing war.

The defence of alien enemy is by no means favoured in the law; and some modern cases have gone a great way in discountenancing it; farther indeed, than seems consistent with the general rules of pleading. In *Casseres vs. Bell*,²³ the court held, that the plea of alien enemy must not only aver such hostile character, but also set forth every fact that negatives the plaintiff's right to sue; and this decision is expressly put upon the mere ground of authority. On a

²² *Kelly vs. Harrison*, 2 John. C. 29.—*Jackson vs. Lunn*, 3 John. C. 109.

²³ 8 T. R. 166.

careful examination, however, of the cases cited, it will not be found that they support the doctrine. In *Derrier vs. Arnaud*,³⁴ the original record of which, Lord Kenyon says, had been examined, the plea negatived every presumption that could arise in favour of the plaintiff's right to sue. But the case did not turn at all upon that point, but simply on the question, whether *oriundus*, in the plea, was equivalent to *natus*, and upon examining precedents, the court held the plea good; and, as no such objection was made, it seems difficult to admit, that a mere averment of the additional facts was adjudged necessary, when upon the judgment of the court it stands purely indifferent. In *Openheimer vs. Levy*,³⁵ to an action of *assumpsit* the defendant pleaded *alien nce*, without saying alien enemy, and the court held, that, as an alien friend may maintain a personal action, and in order to abate the writ, the plaintiff should be shewn to be an alien enemy, which is not to be presumed, nor the contrary necessary to be replied, therefore the plea was bad; and so the law had before that time been held.³⁶ The case, therefore, steers wide of the doctrine contended for. In *Wells vs. Williams*,³⁷ to debt upon a bond by an executor, the defendant pleaded, that the plaintiff was an alien enemy, and came into *England* without a safe conduct. The plaintiff replied, that at the time of making the bond he was, and yet is, in *England*, by the license, and under the protection of the King; and upon demurrer the court held, not that the plea was bad, but that the replication was good; and the court resolved, that if the defendant came there before the war, there was no need of a safe conduct; and if he came since the war, and continued without molestation, it should be intended

³⁴ 4 Mod. 405.³⁵ 2 Str. 1082.³⁶ Dyer, 2.³⁷ 1 Id. Ray. 282. S. C. Lutw. 34. Salk. 48.

that he came by a license, and his right to sue was consequent upon his protection. In this case, also, the objection did not arise; for the only question seemed to be, whether a residence by the license, and under the protection of the King, would entitle the party to sue without having a safe conduct; and the court held that it would. And this is but an affirmance of the doctrine of the year books.³²

These are all the authorities, upon which *Casseres vs. Bell* professes to have been decided. On the other hand, in *Sylvester's* case³³ (which was not cited,) where the plea was *alien enemy*, on demurrer, the court held it good; and that, if the party were entitled under a general or special protection of the King, he ought to reply that fact. And so were the pleadings in *George vs. Powell*.³⁴ And there are several other precedents, in which the plea does not negative the facts, which might enable an alien enemy to sue.³⁵

If, therefore, the present question turned at all upon *Casseres vs. Bell*, which was cited at the argument, it would require a good deal of consideration, before that decision could be maintained. The case of *Clark vs. Morey*,³⁶ pushes the doctrine farther, and asserts that an alien enemy, who comes and resides here without a *safe conduct* or *license* from the government, (for so is the averment in the plea) is at all events entitled to sue, until ordered away by the President; and this too, although the party is not known by the government to have his residence here. The English authorities have always required an express safe conduct or an implied license; and *Boulton vs. Dobree*³⁷ decides, that a license is not to be implied from mere residence, un-

³² 32 H. 6, 23 b.³³ 7 Mod. 150.³⁴ Fortescue, R. 221.³⁵ 9 Edw. 4, 7, Cro. Eliz. 142.³⁶ 10 John. R. 69.³⁷ 2 Camp. R. 163.

less sanctioned by the government after the commencement of hostilities.

The present case, however, may well rest upon distinct grounds; for whether the facts should, in pleading, come from one party or the other, to bring the plaintiff within, or to take the plaintiff out of, the disability of alien enemy: it is very clear, that every fact must appear on the record, which negatives his right to sue; otherwise the judgment cannot be arrested.

The objections to the rendition of judgment for the demandants, in the case at bar, seem to be two; first, that the corporation itself, being established in the enemy's country, acquires the enemy's character from its domicile; second, that the members of the corporation are subjects of the enemy, and therefore personally affected with the disability of hostile alienage.

It is certainly true, that as to individuals, their right to sue in the courts of a belligerent, or to hold or enforce civil rights, depends not on their birth and native allegiance, but on the character, which they hold at the time when these rights are sought to be enforced. A neutral, or a citizen of the *United States*, who is domiciled in the enemy's country, not only in respect to his property, but also as to his capacity to sue, is deemed as much an alien enemy, as a person actually born under the allegiance and residing within the dominions of the hostile nation. This, indeed, has long been settled as the general law of nations, and enforced in the tribunals of prize; and has been latterly recognised and confirmed in the municipal courts of other nations.⁴⁴ And the same principle has been applied to a house of trade established in a hostile country, al-

⁴⁴ *Omealy vs. Wilson*, 1 Camp. 482. *McCConnell vs. Hector*, 3 Bos. & Pull. 113.

though the parties might happen to have a neutral domicil; the property of the house being, for such purpose, considered as affected with the hostile character of the country, in which it is employed.⁴⁵

In this respect, a corporation, authorized by its charter to carry on trade, and established in the hostile country, such as the *East India Company*, would undoubtedly be held, as to its property, within the same rule, even admitting its members possessed a neutral domicil. In general, an aggregate corporation is not in law deemed to have any commorancy, although the corporators have⁴⁶; yet there are exceptions to this principle; and where a corporation is established in a foreign country, by a foreign government, it is undoubtedly an alien corporation, be its members who they may; and if the country become hostile, it may, for some purposes at least, be clothed with the same character. Even in respect to mere municipal rights and duties, an aggregate corporation has been deemed to have a local residence. It has been held to be an "inhabitant" under the statute for the reparation of bridges;⁴⁷ and an "inhabitant and occupier" liable to pay poor rates, under the statute, 43 El. ch. 2.⁴⁸ It may therefore acquire rights, and be subject to disabilities, arising from the country, if I may so express myself, of its domicil. And, indeed, upon principle or authority, it seems to me difficult to maintain, that an aggregate corporation, as for instance an insurance company, a bank, or a privateering company, established in the enemy's country, could, merely from its being an invisible, intangible thing, a mere incorporeal and legal entity, be entitled to main-

⁴⁵ *The Vigilantia and the cases therein cited*, 1 Rob. R. 1. [*The Indiano. post.*]

⁴⁶ *Inhabitants of Lincoln County vs. Prince*, 2 Mass. R. 544.

⁴⁷ 22 H. 8, ch. 5. 2 Inst. 697, 703. ⁴⁸ *Res. vs. Gardner, Comp.* 83.

tain actions, to enforce rights, acquire property or redress wrongs, when its own property on the ocean would be good prize of war. If the reason of the rule of the disability of an alien enemy be, as is sometimes supposed, that the party may not recover effects, which, by being carried hence, may enrich his country, that reason applies as well to the case of a corporation, as of an individual, in the hostile country. If the reason be, as Lord Chief Justice *Eyre* in *Sparenburg vs. Barnatine* * asserts it to be, that a man professing himself hostile to our country, and in a state of war with it, cannot be heard, if he sue for the benefit and protection of our laws, in the courts of our country, that reason is not less significant in the case of a foreign corporation, than of a foreign individual, taking advantage of the protection, resources and benefits, of the enemy's country. In point of law, they stand upon the same footing. It has been argued, that the Court will look to the purposes, for which the corporation was instituted, and to the conduct, which it observes; if these be innocent or meritorious, they afford an exception from the general rule. But it is not the private character or conduct of an individual, which gives him the hostile or neutral character. It is the character of the nation, to which he belongs and where he resides. He may be retired from all business, devoted to mere spiritual affairs, or engaged in works of charity, religion and humanity, and yet his domicile will prevail over the innocence and purity of his life. Nay more, he may disapprove of the war, and endeavour by all lawful means to assuage or extinguish it, and yet, while he continues in the country, he is known but as an enemy. The same principle must apply, in the same manner, to a corporation. The objects,

* 1 Bos. and Pull. 163.

indeed, of the present corporation are highly meritorious and worthy of public favour; but, upon the doctrines of law, it must be deemed a British alien corporation, and as such liable to the imputation of being an enemy's corporation, unless it can be protected upon other principles.

Let us now advert to the second objection, which is, that the members of the corporation are all alien enemies. In the writ, it is expressly alleged, that all the members are *aliens* and *subjects of the King of the United Kingdom of Great Britain and Ireland*. It does not however hence necessarily follow, that they are *alien enemies*. This averment in the writ was proper, if not indeed indispensable, in order to sustain the jurisdiction of this Court; for the corporation, as such, might perhaps have no authority whatsoever to maintain an action here, under the limited jurisdiction confided by the constitution of the *United States* to their own courts. But in the character of its members, as *aliens*, we have incontestable authority to enforce the corporate rights; and it has been solemnly settled by the Supreme Court, that for this purpose the court will go behind the corporate name, and see who are the parties really interested.⁵⁰ And if, for this purpose, the court will ascertain who the corporators are, it seems to follow, that the character of the corporators may be averred, not only to sustain, but also to bar, an action brought in the name of the corporation. It might therefore have been pleaded in this case, even if the corporation had been established in a neutral country, that all its members were alien enemies; and upon such a plea, with proper averments, it would have deserved great consideration, whether it was not, *pendente bello*, an effectual bar. Where the corporation is established in the enemy's country, the plea would *a fortiori* apply.

⁵⁰ *Bank of United States vs. Deveaux*, 5 Cranch, R. 61.

But, although the corporation itself, and the members also, may be liable to the imputation of being alien enemies; yet that character does not necessarily or unavoidably attach to either. For aught that appears upon the face of the record, every member of the corporation may be now domiciled in the *United States*, under the safe conduct or license of Government. In such a predicament, it is clear, that though aliens, they would not be enemies, but might sue and be sued in our courts.²¹ And in respect to the corporation itself, although established in *Great Britain*, it may have the safe conduct or license of the government of the *United States* for its property, and the maintenance of its corporate rights. It is clearly competent for the Government, under the general rights of war, to grant letters of protection, and thereby to suspend the hostile character of any person; and when he has such protection, wherever he may be domiciled, he is to be considered, *quoad hoc*, a neutral.²²

Nor is there, in this respect, any difference between a corporation and an individual. And it would be highly injurious to humanity, as well as public policy, if institutions established in a foreign country for religious, literary or charitable purposes, might not, during war, obtain protection and patronage for their laudable exertions to soften private misery and diffuse private virtue. To support the motion in arrest of judgment, it is necessary for the Court to negative every presumption, that could arise, of a safe conduct or license, either to the members or to the corporation itself. This cannot be done in the present case consistently with the principles of law. The suit was commenced in a time of peace, and every pre-

²¹ *Bynck. Q. J. P. cap. 25, s. 8, Wells vs. Williams, 1 L'd Ray. 282.*

²² *Bynck. Q. J. Pub. cap. 7, Uperichs vs. Noble, 13 East. R. 332.*

sumption, which can, ought to be made, to support it. It is sufficient, however, that by possibility the demandants, in their corporate capacity, and the capacity of their members, may have a *persona standi in judicio*, to entitle them to judgment.

There is another consideration also, which may properly weigh in this case. The suit was commenced during peace, and, on the declaration of war, it was competent for the tenants to plead the hostile alienage of the demandants, if it existed, in bar to the farther prosecution of the suit, in the nature of a plea *puis darrein continuance*, as it was pleaded in *Le Bret vs. Papillon*.²³ They did not so plead, and thereby have affirmed the ability of the demandants to prosecute the suit to judgment. Upon this ground, where the disability of alien enemy occurred before judgment, and on a *scire facias* on the judgment the disability was pleaded, the plea has been held bad.²⁴

Another consideration derived from the express provision of the 9th article of the British Treaty, of 1794, ought not to be omitted. That article stipulates, that British subjects, who then held land in the territories of the *United States*, and American citizens, who then held land in the dominions of His Majesty, shall continue to hold them, according to the nature and tenure of their respective estates and titles therein, and may grant, sell, and devise the same, to whom they please, in like manner as if they were natives; and that neither they, nor their heirs or assigns, shall, so far as respects the said lands and the legal remedies incident thereto, be regarded as *aliens*.— This article has never been annulled, and therefore remains in full force. It deserves, and ought to receive, a liberal and enlarged construction. There can be no doubt, that corporations, as well as individuals, are within its purview;

²³ 4 East. R. 502.

²⁴ *West vs. Sutton*, 2 Ld. Ray. 353.

and the present claim not only may be, but in fact is, one which it completely embraces. The title of the demandants, as has been already stated, accrued before the revolutionary war. It was obviously the design of the contracting parties, to remove the disability of alienage, as to persons within the purview of the article, and to procure to them a perfect enjoyment and disposal of their estates and titles. If, during war, their right to grant, sell or devise, such estates and titles were suspended, it would materially impair their value. If the remedies incident to such estates for trespasses, disseisins, and other tortious acts, were during war suspended, not only would the security of the property be endangered, but if war should last for many years, the statute of limitations of the various states would, by lapse of time, bar the party of his remedy, and in some cases of his estate. This seems against the spirit and intent of the article, and puts the party upon the footing of an alien enemy, while the language concedes to him all the benefits of a native. Looking to the general moderation, with which the rights of war are exercised in modern times, under the policy, if not the law, of nations; perhaps it would not seem (for I mean not to give any absolute opinion) an undue indulgence, to hold, that as to all titles and estates within the article, an alien enemy may well maintain all the legal remedies, as in a time of peace. At least, it cannot be presumed, that in this favoured class of cases, the party has not received the license or safe conduct of the government, to pursue his rights and remedies during the war. And unless such presumption can be made, when there are no facts on the record to warrant it, the plaintiffs must be entitled to judgment.

Upon the whole, the motion in arrest of judgment must be overruled.

The other question, which has been argued upon the motion of the demandants, is yet of more delicacy and embarrassment. It is always an unwelcome task to call in question the constitutionality of the acts of a state legislature. It is still more unwelcome, when there has been an apparent acquiescence on the part of state tribunals, for whom this Court cannot but entertain the most entire respect and confidence. The parties, however, have chosen to present the question before us, and we are bound to pronounce the law, as upon a careful examination we find it; and if an error be committed, it is a great consolation, that the decision here is not final, but a revision may take place before other judges, whose diligence, learning and ability, cannot fail to ensure a most exact and well considered determination.

The demandants contend, first, that the act in question is in contravention of the 2d, 3d, 12th, 14th and 20th articles of the bill of rights, in the constitution of *New Hampshire*; and of the 10th section of the first article, and the 9th article of the amendments, of the constitution of the *United States*; and is also repugnant to natural justice; and is therefore void. Secondly, that the act, if constitutional, extends only to suits in the state courts, and not to suits in the courts of the *United States*; and, at all events, not to suits, in which a foreigner is a party. There is another objection, as to the shape in which the claims for the improvements are asserted in the pleadings, upon which it is unnecessary to say more, than that they have as much certainty, as has been deemed necessary in the practice of the state courts, and as seems required by the act, and therefore, are good in substance.

The objection, that the act had in contemplation actions in state courts only, between citizens of the state, cannot prevail. Whatever force such an objection might properly

have in cases of personal contracts executed without the territories of a state, where a remedy should be sought in the courts of the *United States*, under circumstances, in which the state laws could afford no remedy, it is a general rule of the law of nations, recognised by all civilized states, that rights and remedies respecting lands are to be regulated and governed by the law of the place, where the land is situated.⁵⁵ Independent, therefore, of the act of Congress of the 24th of Sept. 1789, ch. 20, s. 34, which declares, "that the laws of the states, except where the constitution, treaties, or statutes of the *United States*, shall otherwise require or provide, shall be regarded as rules of decision, in trials at common law, in the courts of the *United States*, in cases where they apply," the laws of the state regulating titles and remedies to real estate, must, in the absence of other regulations by the *United States*, be, upon general principles, the rules of decision equally between foreigners and between citizens.

In respect also to the constitution of the *United States*, the statute in question cannot be considered as void. The only article, which bears on the subject, is that which declares, that no state shall pass "any *ex post facto* law, or law impairing the obligation of contracts." There is no pretence of any contract being impaired between the parties before the Court. The compensation is for a tort, in respect to which the legislature have created and not destroyed an obligation. Nor is this an *ex post facto* law within this clause of the constitution, for it has been solemnly adjudged, that it applies only to laws, which render an act punishable in a manner, in which it was not punishable, when it was committed.⁵⁶ The clause does not touch civil rights or civil remedies.

⁵⁵ *Huber. tom. 2, lib. 1, Tit. 3.—Vattel. B. 2, ch. 7, s. 85, B. 8, s. 109, 110.*

⁵⁶ *Calder vs. Bull, 3 Dall. R. 386.—Fletcher vs. Peck, 6 Cranch, R. 87.*

The remaining question then is, whether the act is contrary to the constitution of *New Hampshire*. Various clauses of that constitution have been cited; but that which seems most directly pointed to the case, and which must (if any one can) govern it, is the 23d article of the bill of rights, which declares, that "retrospective laws are highly injurious, oppressive and unjust. No such laws, therefore, should be made, either for the decision of *civil causes* or the punishment of offences."

What is a retrospective law, within the true intent and meaning of this article? Is it confined to statutes, which are enacted to take effect from a time anterior to their passage? or does it embrace all statutes, which, though operating only from their passage, affect vested rights and past transactions? It would be a construction utterly subversive of all the objects of the provision, to adhere to the former definition. It would enable the legislature to accomplish that indirectly, which it could not do directly. Upon principle, every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective; and this doctrine seems fully supported by authorities.* The reasoning in these authorities, as to the nature, effect and injustice, in general, of retrospective laws, is exceedingly able and cogent; and in a fit case, depending upon elementary principles, I should be disposed to go a great way with the learned argument of Chief Justice *Kent*.

Let us now consider the particular facts of the case at bar, and the provisions of the act of the 19th of June, 1805. Before the passage of that act, the demandants had a clear

* *Caldar vs. Bull*, 3 *Dall. R.* 386.—*Dash vs. Van Kleeck*, 7 *John. R.* 477.

vested right and title in the demanded premises in fee, absolute and unconditional; and although the seisin was in another, yet the existing laws afforded a complete remedy to perfect that title by an union *juris et seisinæ*, under judicial process. The demandants were also entitled, both at law and equity, not only to the land, but to all the improvements thereon, which were annexed to the freehold, by whomsoever made, under that vested right and title. The law imputed no laches to the demandants for not pursuing their legal remedy to recover seisin, for the time of the statute of limitations had not run against them; and it imposed no obligation to pay for any amelioration of the soil, or any erections, which had been made by any person claiming an adverse possession or seisin. Then came the act, which, in the third section, provides "that when any action shall be brought against any person for the recovery of any lands or tenements, which such person holds by virtue of a supposed legal title, under a *bona fide* purchase, and which the occupant, or the person under whom he claims, has been in the actual peaceable possession and improvement of for more than six years before the commencement of the action, the jury which tries this action, if they find a verdict for the plaintiff, shall also inquire and by their verdict ascertain, the increased value of the premises by virtue of the buildings and improvements made by such person or persons, or those under whom he or they claim, and no writ of seisin or possession shall issue upon such judgment, until such plaintiff shall have paid into the hands of the clerk of said court, for the use of the defendant, or person or persons justly entitled thereto, such sum as said jury shall assess, as aforesaid, which sum shall be paid to the clerk within one year after the verdict rendered by the jury, otherwise no writ of possession shall issue." This section was to take effect from the passage of the act.

The present action was brought in 1807, and if, as the tenants contend, the act applies to it, it must be upon the ground, that the six years possession under a supposed legal title is to be calculated backwards, from the time of the commencement of the action, although that time should not have elapsed after the date of the act. And in this view, the argument to support its constitutionality must be the same, as though the action were commenced immediately after the passage of the act. It may be admitted, that if this were a mere statute of limitations, barring the actions in the realty after a reasonable time, under the exercise of legislative discretion, its constitutionality could not be doubted. And if the statute had declared, that if a party entitled should, for six years after passing the act, or for six years after any ouster or disseisin *in futuro*, neglect to pursue his remedy for the recovery of his right, then the recovery should only be had upon the terms of the act, it might, perhaps, have fallen under the same consideration, for it would in effect be only a rigorous statute of limitations.

But if the legislature were to pass an act of limitations, by which all actions upon past disseisins were to be barred, without any allowance of time for the commencement thereof *in futuro*, it would be difficult to support its constitutionality, for it would be completely retrospective in its operation on vested rights.⁵⁵

But the present cannot be considered as a statute merely regulating a remedy, and prescribing the mode and time of proceeding. It confers an absolute right to compensation on one side, and a corresponding liability on the other, if the party would enforce his previously vested title to the land. And unless he should comply within a given time,

⁵⁵ *Call vs. Hagger*, 8 Mass. R. 423.

his title, or, what is in effect the same thing, his remedy, is completely extinguished. It is not, therefore, in form, or in substance, a modification of the remedy, but a direct extinguishment of a vested right in all the improvements and erections on the land, which were annexed to the freehold. It also directly impairs the value of the vested right of the party in the land itself, in as much as it impairs the remedy, and subjects the party to burthens, which may render the right not worth pursuing; and that too upon past considerations, respecting which the party had incurred no legal obligation, and had imputed to him no legal laches. If, indeed, it ought, as is alleged, to be the very essence of a new law, that it is to be a rule for future cases, *nova constitutio futuris formam imponere debet, non praeteritis*,²⁰ and that it is against natural justice to apply it to past cases, it would seem to follow, that an act, which works the effects, which have been stated, ought to be deemed a retrospective law within the prohibition of the constitution of *New Hampshire*; for it is a law for the decision of a civil cause, which affects past cases; and has a retroactive operation.

It is argued by the tenants' counsel, that although there was no legal remedy, yet there was an equitable right in the tenants, before the statute, to compensation for the amelioration of the soil, and the improvements made by erections thereon; that upon the principles of natural justice, it is iniquitous that one man should enjoy the fruits of another man's labour; that until a recovery actually obtained by the demandants, they had no vested title to such improvements, but the title remained in the tenants; and therefore the statute had no operation to divest previous rights. In this respect the case is likened to that of temporary fixtures and erections, made by a tenant for years

²⁰ *Bract. lib. 4, fol. 223.*

during his term, in which the reversioner has never been supposed to have any interest whatever.

It is difficult to perceive the foundation of the equitable or moral obligation, which should compel a party to pay for improvements, that he had never authorized, and which originated in a tort. If every man ought to have the fruits of his own labour, that principle can apply only to a case, where the labour has been lawfully applied, and the other party has voluntarily accepted those fruits without reference to any exercise of his own rights. For if, in order to avail himself of his own vested rights, and use his own property, it be necessary to use the improvements wrongfully made by another, it would be strange to hold, that a wrong should prevail against a lawful exercise of the right of property. In the case of a tortious confusion of goods, the common law gives the sole property to the other party without any compensation. Yet the equity in such case, where the shares might be distinguished, would seem much stronger than in the present case.

There would also have been plausibility in the argument, if the statute had confined itself to visible erections made by the tenant, who had been six years in possession, under a supposed legal title. But the improvements may be altogether in the soil, and even made by the original wrong doer, and yet the compensation must be allowed. And they may be just such improvements, as, in the case of a rightful tenancy, would at common law be deemed waste.

It is sufficient, however, that no such equitable right, as is now contended for, is recognised in the law; and indeed it has been deemed so far destitute of moral obligation, that even an express promise, to pay for improvements made by a person coming in under a defective title, has been held a *nude pact*."

As to the argument, that the demandants had no vested title in the improvements until a recovery, it is clearly unfounded in law. In respect to the amelioration of the soil by labour, (which is embraced both by the statute and the verdict) it would be absurd to contend, that the amelioration was a thing separate from the soil, and capable of a distinct ownership. In respect to erections, the common law is clear, that every thing permanently annexed to the freehold passes with the title of the land, and vests with it. And here lies the distinction as to fixtures during a lease. They are not deemed to be permanently annexed to the soil, and may, therefore, well be removed; and so indeed would the law be, as to like fixtures by a mere trespasser.^a The right then to permanent erections follows as a necessary and inseparable incident to the right of the soil, and is not acquired, but is merely reduced into possession, by a subsequent suit.

On the whole, if the statute must have a construction, which will embrace the case at bar, with whatever reluctance it may be declared, in my judgment it is unconstitutional, in as much as it divests a vested right of the demandants, and vests a new right in the tenants, upon considerations altogether past and gone.

But there is a construction, which although not favoured by the exact letter, may yet well stand with the general scope of the statute, and give it a constitutional character; and that is, to give it a prospective operation, so as to apply to improvements made after the statute, and where the possession has been for six years after its date. In deference to the legislature, this construction ought to be adopted, if by law it may. And upon the authority of

^a *Taylor vs. Townsend*, 8 Mass. R. 411.

Society, &c. vs. Wheeler.

Gilmore vs. Skuter,²² and *Couch vs. Jefferies*,²³ and *Dash vs. Van Kleeck*,²⁴ where the wording of the statutes was equally strong, I do not at present perceive any difficulty in adopting it.

In either view, the tenants can take nothing by their claims for improvements, and judgment must pass for the demandants, and a writ of seisin issue immediately *non obstante veredicto quoad hæc*.²⁵

Freeman for the demandants.

Richardson for the tenants.

Judgment was entered on the record as follows:—

All which being seen and considered, it appears to the Court here, that the tenants are not by law entitled to the value of the buildings and improvements so as aforesaid found by the verdict aforesaid, or to any part thereof, under the statute of *New Hampshire* in this behalf provided. It is therefore considered by the Court, that the demandants recover their seisin and possession of the demanded premises, whereof the jury have by their verdict aforesaid found that they were disseised by the tenants—and that a writ of seisin immediately issue in this behalf; and farther, that the demandants recover of the tenants their costs of suit taxed at

And as to the residue of the demanded premises, that the tenants go thereof quit without day.

²² 2 *Shower*. 17.—*S. C.* 2 *Mod.* 310.—1 *Freem.* 466.—2 *Lev.* 227.—2 *Jones*, 108.—1 *Vent.* 330.

²³ 4 *Burr. R.* 2460.

²⁴ 7 *John. R.* 477.

[²⁵ See *Fox vs. Southack*, 12 *Mass. R.* 143.—*Hutchinson vs. Brock*, 11 *Mass. R.* 119.]

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Money deposited in a bank under a decree of the Court, and subject to its order, is "money deposited in Court" within the meaning of the act of 1793, ch. 20, sect. 2. And the clerk is entitled to commissions upon such money in the same manner, as if it had actually been paid into his hands.

AT this term, a petition was filed by *G. W. Prescott, Esq.* the clerk of the District Court of the District of *New Hampshire*, in behalf of himself and of the late clerk of said court, praying that a monition might issue to *Messrs. Prince and Deland*, prize agents of the private armed ship *America*, to bring into court, out of the prize proceeds of the ship *St. Lawrence* and cargo, the amount of the commissions, due to said clerk, of one and one quarter per cent. upon said proceeds, the same having been paid over to said agents upon a decree of final condemnation executed by this Court in pursuance of the mandate from the Supreme Court. The agents, having appeared to the monition, which issued on this application, asserted in their defence, that under all the facts and circumstances of the case, no commissions were due, either to the present or former clerk, out of said proceeds; and that the sum of \$ 2317 15, and no more, now remained in their hands undistributed, which sum had been reserved to await the supposed claim in this case, under a notice that half per cent. commissions, and no more, would be insisted on.

The facts alluded to are as follows:—At the October term of this Court in 1813, the Ship *St. Lawrence* and cargo were condemned as good prize to the captors,¹ and from the decree of condemnation the claimants appealed to the Supreme Court. At the same term, the captors moved the Court to order the ship and cargo to be sold, and the proceeds to be deposited in the registry of the Court, or de-

¹ *Ante*, 1 Vol. 467.

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livered to the captors on bail. Upon this motion, after hearing the parties, the Court by consent passed the following order—"Ordered, that the cargo of the ship *St. Lawrence* be unlivered by and under the direction of the Marshal of this District, and after unlivery be sold by the Marshal aforesaid at publick auction at *Portsmouth*, the sale to be notified in some one or more publick newspapers printed in *Portsmouth*, in *Salem*, in *Boston*, and in *New York*, at least twenty days before the sale, and the said cargo to be sold for cash only; and that the proceeds of the said cargo, after sale, be deposited one half in the *New Hampshire Bank* and one half in the *New Hampshire Union Bank*, in *Portsmouth*, subject to the order of this Court in term, and in vacation to the order of the associate Justice of the Supreme Court of the *United States*, assigned to the first circuit; and that a warrant issue to the Marshal to execute this order."—A warrant issued to the Marshal in conformity with this order, and the cargo and the ship also, by consent of the parties, were sold, and the proceeds deposited by the Marshal, in the name of the Court, in the Banks at *Portsmouth*, according to the order, and so remained deposited until the last May Term of this Court, when the decree of condemnation having been affirmed as to all the claims, but one, by the Supreme Court, in pursuance of a mandate of the same court, the proceeds were delivered over to the prize agents, and parties entitled thereto.

It is unnecessary to state the facts, as to the relative rights of the present and former clerk, as it was conceded by the parties, that if either was entitled, the whole commissions might be paid to the present clerk.

Humphreys, Dist. Attorney, and *E. Cutts* for the clerk. This is to be considered as an abstract question, without any regard to the quantum of money paid. The law,

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which regulates the clerk's fees, provides that "on all money deposited in court," or which is the same thing, "paid into court," he shall have one and a quarter per cent. It is said, that this commission is allowed him for his care and trouble in receiving, keeping and paying over money, which is actually paid into his hands, and therefore ought not to be given in the present instance, because he has had no trouble respecting it.

What then is meant by paying money into court? Certainly not that it should be told and laid on the table, in sight of the court, or delivered from their servant the Marshal, to their servant the clerk. It is sufficient, if it be placed completely in their power and control. If the Marshal, for greater security, should pay it into a bank, and deliver to the court his check, the money would to all intents be paid into court, though never seen by them. This is confirmed by a subsequent order of the Court, which, after directing payment of a portion of this money, speaks in express terms of "the balance of the money remaining in court."

The order in the present case differs from that usually passed, only in directing payment into the Bank. The control of the court is still the same. Ought the owners to misinterpret an unimportant deviation from the common form, as depriving an officer of the court of a commission, which he had a clear right to claim? The law respecting the clerk's emoluments is unambiguous. Those interested may, some of them at least, wish to make their great prize *still greater* by a diminution of these emoluments. They may persuade themselves, that though the law does not give them too much, when it *enriches* them by this capture, yet it gives the clerk too much. But it is not for them or us to judge of the *reasonableness* of the law. We are both confined to its *meaning*.

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The duties of a clerk are arduous and responsible. In order to support the respectability of the office, and to compensate for other low fees, Congress added the commission as a *perquisite*, not as a *quantum meruit* for a particular service.

The Court, by its solemn acts and decrees, disposing of and distributing this money, has determined, that the money was deposited in court. And the owners and captors have as solemnly agreed in this determination. They confirmed it by their receipt now in court, by which they acknowledge, that they had received the specified sum "from the Circuit Court."

Thus there has been no departure from the legal course, nor any material departure from the usual course. Nor indeed could there have been. For what would be the consequence? No less than this; if by an order to deposit the money in a bank, the clerk's commission was taken away, it would follow that the court could change the law respecting his commission, and *take it away*, by making such an order, in every case. But it is impossible to admit a construction, that might take away all his commission in every case, when both the first and last act give him a commission, and it seems admitted, that he would be entitled now to his half *per cent.* if the court, as in our case, should order the money, in the first instance, to be paid not to the court itself, but to a bank, subject to the court's order.—It may be added, finally, that our construction is confirmed by the consideration, that it is the only one consonant with the distinguishing principle, that marks such admiralty or civil law proceedings, namely, *that the court itself is the medium of transfer or distribution*, whenever property decreed forfeited is ordered to be distributed.

Pitman, for the prize agents, argued to the contrary. But, as the reporter was not present, he is unable to state the

argument. The opinion of the Court was delivered at a subsequent day.

STORY, J. The act of the 1st of March, 1793, ch. 20, sec. 2, revived by the act of 28th of February, 1799, ch. 125, s. 3, provides, that in all cases of admiralty jurisdiction, the clerk of the District Court shall, among other fees, be entitled to one and one quarter *per cent.* on "all money deposited in court."—The single question presented for decision is, whether the proceeds of the *St. Lawrence* and cargo were, within the meaning of this clause, "deposited in court;" If so, then the clerk is entitled to his commission; if otherwise, then his application must be dismissed.

It is argued by the counsel for the prize agents, that the money in this case never was deposited in court, because it never was brought into court, nor actually or constructively in the hands or possession of the clerk; that the commissions in the statute were intended as a remuneration to the clerk for the custody of the money, and for labour and care in its receipt and payment; and therefore, that the present case falls neither within the letter nor spirit of the provision.

It is highly probable, when we consider the few banks existing at the passage of this statute, that the legislature contemplated the case of an actual custody by the clerk of money deposited in court. But it by no means follows, even admitting this argument to be correct, that this was the sole or governing motive for the fees allowed him. Other important considerations might well have weighed with a wise legislature, not only to provide a sufficient salary for its ministerial officers, but also a recompense for collateral services, *pro opere et labore*, in business incident to

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the disposal of the money of the court. Independent of the custody of money, the interlocutory orders, touching its receipt, deposit and distribution, may, and in fact do, in admiralty proceedings, often involve considerable detail and responsibility. The very case before the Court is a proof of it; and if the captors, instead of a payment to the general agents, or to a few private agents, had required a distribution of their individual shares separately and singly from the Court, as they well might, the compensation now sought would not have been so extravagant a reward, as it is now urged to be.

Be these considerations as they may; it is not by conjecture, but upon legislative intentions apparent in the statute, that the words are to be construed. Where the language of an act is plain and clear, cases are not to be excepted from the generality of the expressions, unless such exceptions are fairly implied, or necessarily drawn from the purview. The statute does not speak of money coming into the hands or possession of the clerk, and to engraft such a qualification upon the language would be legislation, and not judicial construction.—“Money deposited in court” cannot mean money brought in and deposited *sedente curia*, in the actual manual possession of the court. Such a construction would be against all practice, as well as all legal reasoning. It must therefore mean money, which is deposited subject to the order of the court, be it in whose actual possession it may, whether of a bank or of an officer of the court. In such a case, the bank or officer acts as the mere fiduciary, or depositary, of the court, and in legal contemplation the money is in the custody of the court. It would be a contempt of the court for any other person to intermeddle therewith. It is a mere substitute for the original property seized under

the process of the court, and as much under its sole and exclusive direction, as the property itself. It is emphatically (what all property seized under admiralty process is) in the custody of the law. In this respect, it differs widely from the case of property delivered regularly and *bona fide* on bail. The latter is no longer subject to the control or custody of the court; and the parties to the stipulation are not the depositaries, but the debtors of the court.

On the whole, I am of opinion, that the money in the present case was, in legal intendment, deposited in court; and, consequently, the clerk was and is entitled to the fees prescribed by law. This construction is, in my judgment, fully supported by the more recent acts applicable to this subject; I mean the acts of 18th of April, 1814, ch. 121 and ch. 138.

It is conceded, however, by the parties, that no more than one half part can now be claimed from the prize agents, and with that the clerk is content, I shall therefore decree the money admitted to be in the hands of the prize agents to be brought into court, and paid over to the clerk.

HATCH vs. WHITE.

After a foreclosure of a mortgage, the mortgagee may still recover at law, upon the attendant bond or note, the deficiency of the mortgaged property to pay the debt due, calculating the value of such property at the time of the actual foreclosure.

THIS was an action of debt on a judgment for \$ 4605,31 damages, and \$36,03 costs of suit, recovered in the Supreme Judicial Court of *Massachusetts* in September, 1810. The

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defendant, after praying oyer of the record, among other pleas, pleaded, in substance, that the judgment was recovered on a promissory note given by the said *White*, for the sum of \$———, to the said *Hatch*, on the 20th day of May, 1807, payable at a day long since past, and that, at the time of making the said note, the said *White* mortgaged to the said *Hatch* in fee, as collateral security for the payment of the same note, a certain farm situate in *Rutland*, in *Massachusetts*; that the said *Hatch* afterwards, on the 10th of May, 1810, on account of the breach of the condition of said mortgage deed, by open and peaceable entry, made in the presence of two witnesses, took actual possession of said mortgaged premises, and continued that possession peaceably for more than three years after said entry; and the plea then avers a payment of \$36,03 in satisfaction of the costs in said suit. To this plea there was a general demurrer and joinder.

STORY, J. delivered the opinion of the Court. There is no averment in the plea of the value of the mortgaged estate; nor that it was taken in full satisfaction of the debt; nor that the equity of redemption of the mortgagor was foreclosed. The case, therefore, stands dryly upon the legal operation of the allegations in the plea unaided by collateral facts.

Oyer of the record is prayed and has been allowed by the parties without objection. But, as this judgment is a record of another court, in strictness no such oyer is demandable. It is therefore an irregularity, which though not affecting the merits, might well attract the attention of the parties.

Waiving however all exceptions to the regularity of the pleadings, I proceed to the consideration of the only question argued at bar by the parties; whether, after a foreclo-

sure of a mortgage (as the entry and continued possession for three years pleaded in this case are by the statute of *Massachusetts* admitted to be) the mortgagee can, in a suit upon the attendant note or bond, recover the deficiency in value of the mortgaged estate to satisfy the debt due to him.

It is contended by the defendant, that the foreclosure is either an absolute purchase of, or an election to take, the land in full satisfaction of the debt; and by the plaintiff, that it amounts to a satisfaction of so much only of the debt, as equals the value of the land.

If the doctrine asserted by the defendant be true, it will be found in many instances to work great injustice. Where the value of the property mortgaged, whether real or personal, is less than the debt, no foreclosure of the equity of redemption, and no absolute ownership of such property, can ever be acquired, but upon the absolute extinguishment of the whole debt. Under such circumstances, the value of the pledge in the hands of the mortgagee would be materially diminished, and it would frequently prove, in literal exactness of language, *mortuum vadium*, a dead and worthless security. If the mortgagee be compellable to make an election, the pursuit of a personal remedy on the attendant bond is as much an abandonment of the pledge, as the appropriation of the latter is an abandonment of the debt. In a case therefore of suspected insolvency he would be encircled with perils on every side; and, instead of a double security for his debt, would be left with scarcely a single plank to save himself in the shipwreck. The argument, which would lead to such consequences, is not easily admissible, and if it stand at all, it must be upon technical principles, or authorities, which cannot now be questioned.

A mortgage is but a mere security for the debt, and collateral to it. The debt has an independent existence,

and remains with all its original validity notwithstanding a release of the mortgage. The former is the principal, and the latter an incident, though not an indispensable incident. An assignment of the debt will, in equity, if not at law, carry the mortgaged property along with it; and a release of the debt will relieve the property from all farther claims of the mortgagee.¹ Where the contract executed between the parties is, strictly speaking, a mortgage, that is, a conditional conveyance of the property subject to be divested by a performance of the condition, by non-performance the conveyance becomes absolute, according to the express stipulations of the parties. Where the contract amounts but to a pledge, that is, a mere deposit as security, redeemable on payment of the debt, the creditor acquires a lien or qualified property to that extent; but the stipulations of the parties in no event import a conveyance of the absolute property to the creditor. If he can acquire it, it can only be by an appropriation recognised and enforced by law, in aid of his right, upon the default of the debtor; as seems to have been the case by the ancient writ transmitted to us by *Glanville*.² But an absolute property in the pledge acquired either way, by the stipulations of the party or by the course of the law, upon the default of the debtor, would not seem of itself to operate an extinguishment of the debt secured by a covenant or agreement independent of such pledge. The parties have not agreed to an extinguishment of the debt in such an event, and it is difficult to perceive, how the law should found a peremptory bar, upon the default of the very party who pleads it, against another to whom no laches can be imputed. If,

¹ *Weston vs. Mowlin*, 2 Burr. 969.—*Green vs. Hart*, 1 John. R. 580.

² *Lib. 10, cap. 6.*—*Mores vs. Conham, Owen*, R. 123.

indeed, during the time of redemption, the pledge be injured or lost, or wrongfully detained, there seems reason to hold, as in the ancient law, that a proportionate value should be deducted from the debt, unless a restoration or satisfaction were otherwise made.³ But where there is no such ingredient in the case, the debt ought to retain its original validity; and if equity should interfere to enlarge the time of redemption, or to prevent a double satisfaction, it is the utmost exercise of its authority, which justice or good conscience would seem to require. To deprive the creditor even of a single satisfaction of his debt, in favour of a negligent or fraudulent debtor, would not comport with the maxims, which usually govern courts acting *ex aequo et bono*.

Upon principle then, there would seem no reason to restrain the mortgagee from every remedy in *rem* and in *personam*, until he has obtained a full satisfaction of his debt.

Let us now examine the point with a view to authorities. No case has been cited from the English reports, and as far as a diligent search could enable us to pronounce, no case exists at law, in which the point has been solemnly presented for adjudication. This universal silence, in a case of so frequent occurrence, affords a pretty strong argument, that at law such a plea has never been held a sound defence. Yet, even at law, the incidental expressions of learned judges show the general understanding of the profession on the subject; and the frequent applications to chancery for injunctions, to restrain the creditor from pursuing his personal remedy, have drawn from that court explicit avowals. In *Smart vs. Wolfe*,⁴ Lord Kenyon, comparing it with the case before him, says, "as

³ *Glanville*, lib. 10, cap. 8.

⁴ 3 T. R. 342.

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in case of a pawn, the right to detain which is not divested by the pawnee's also taking a covenant as farther security, on which he may sue the person of the covenantor. The covenant is only considered as an additional remedy, and the party may proceed on both." In *Schoole vs. Sall*,⁵ Lord *Redesdale* declared, that a mortgagee had a right to proceed on his mortgage in equity, and on his bond at law, at the same time. In *Aylet vs. Hill*, in 1779,⁶ and again in *Tooke vs. Hartley*, in 1786,⁷ and *Tooke vs. —*,⁸ Lord *Thurlow*, upon an application for an injunction, held that notwithstanding a foreclosure, the mortgagee had a right to proceed at law on his bond, and might recover on such suit the deficiency of the mortgaged estate to cover his debt; and he declared the law to be now so established. The same may be inferred from the early case of *Dashwood vs. Blythway*,⁹ the only effect there attributed to such suit being, that it opened the foreclosure, and let in the equity of redemption of the mortgagor. It is true, that Lord *Thurlow* in *Tooke vs. —*,¹⁰ (which notwithstanding some discrepancy in dates is probably the same case as in 2 *Bro. Ch. Cas.* 125,) is said to have declared, that after a foreclosure, so long as the mortgagee kept the estate, he must take the pledge as a satisfaction, because, by not knowing what it would produce, he could not say any thing was due; but if he sold the estate fairly and without collusion for the best price, and it produced less than the debt, he would be entitled to recover on the bond for the deficiency.

The reason given for this distinction does not seem satisfactory. The actual value of the estate may as well be

⁵ 1 *Sch. and Lef. R.* 176.

⁷ 2 *Bro. Ch. Cas.* 125.

⁸ 1 *Eq. Cas. Abr.* 317.

⁶ 2 *Dick. R.* 551.

⁹ 2 *Dick. R.* 785.

¹⁰ 2 *Dick. R.* 785.

ascertained, while it is in the hands of the mortgagee, as after a sale; and indeed must be so ascertained, in order to see if it was sold at the best price. At least the fact is not more difficult to settle, than many which ordinarily engage the attention of courts and juries; and if the deficiency be once found, the same equity to have it paid exists in both cases. Besides, if the debt be deemed satisfied while the estate is in the mortgagee's hands, it is not easy to conceive how, by his own act of transfer, he can defeat the legal effect of that satisfaction. And if the doctrine in *Dashwood vs. Blythway* be correct, there would be still less reason to allow the mortgagee to recover after a sale, because, as it would be inequitable to open the foreclosure against the purchaser, it would enable the mortgagee to defeat the revival of the equity of redemption resulting from his personal suit.

It was this last consideration, that inclined Lord *Eldon*, in *Perry vs. Barker*, "to hold, that after a foreclosure and sale of the mortgaged estate, the mortgagee had no right to proceed at law upon the attendant bond, because by the sale he had incapacitated himself to reconvey the estate to the mortgagor; and upon this ground, in the case before him, he granted an injunction until the hearing. In this case however Lord *Eldon* stated, that in *Took vs. Hartley* Lord *Thurlow* had held (and so was a M. S. report of the case taken by Sir *Samuel Romilly*) that whether the estate was sold to a stranger, or remained in the mortgagee, there was no distinction, but an action might be brought for the difference. There seems therefore some reason to doubt the accuracy of the report in 2. *Dick.* 785.

The case of *Perry vs. Barker* afterwards came to a hearing before Lord *Erskine*, "who after a full argument

" 8 *Ves.* 527.

" 13 *Ves.* 197.

decided, that notwithstanding a foreclosure the mortgagee had a right to proceed on his bond ; but that such a proceeding entitled the mortgagor to redeem, and if the mortgagee had previously sold the estate and could get it back, equity ought to allow him time for the purpose. It seems however to have been his Lordship's opinion, that if this could not be done, the mortgagee ought to be restrained from proceeding, and under the peculiar circumstances of the case before him, he decreed a perpetual injunction.

We profess ourselves unable to comprehend the particular principles, upon which in either case a court of equity proceeds to restrain a creditor from pursuing his remedy at law, when by the foreclosure he has not obtained a satisfaction of his debt. We should have thought that natural justice, as well as the stipulations of the parties, would have been better subserved by allowing the creditor every remedy *in rem* and *in personam*, until his debt should be completely satisfied. If afterwards he should make an oppressive use of his power by attempting to obtain a double satisfaction, then and not till then the interposition of chancery by way of injunction would seem conscientious and salutary.

As little can we comprehend the ground, on which, as in *Dashwood vs. Blythway*, courts of equity have held, that a suit on the attendant bond opens the foreclosure, and lets in the equity of redemption. By such foreclosure the mortgagee obtains an absolute estate, which perhaps may well be deemed a purchase at the full value of the land, if less than the debt, and if greater, at the amount of the debt. But why a personal suit to recover the deficiency of the land to pay the debt should change the nature or effect of a foreclosure has not yet been satisfactorily explained. It is rarely that a foreclosure can

take place, where the estate much exceeds the debt in value. Another purchaser is usually found, and a non-redemption therefore affords a pretty strong evidence of an inferiority in value. Besides, is it no inconvenience to the creditor to take land instead of his money? If, after the foreclosure, the estate should become materially lessened in value, the loss has never been deemed to be the mortgagor's. Why then should he derive benefit from an accidental rise in value, when he has been altogether in default? If indeed, after a foreclosure, the mortgagee should come into equity to seek relief against the mortgagor, there might be some room to apply the maxim, that he who seeks equity, must do equity. But in fact he only claims the exercise of his legal rights secured to him by contract; and is then told, that he must submit to retrace all his steps, or an injunction will bar his proceedings. And even if such a hard measure of justice were dealt out to the mortgagee, while the property was in his own hands, it would seem not inequitable, when he had rightfully passed it to a purchaser, to hold him entitled to his personal remedy for all the pledge had failed to pay. That a sale after a foreclosure should be deemed so far a wrongful act, as to draw after it the penalty of a perpetual injunction, is a doctrine not easily reconcileable with the sound principles, which govern contracts of this nature. We are happy to add, that the opinions imputed by the better authorities to Lord *Thurlow* sanction the doctrines, for which we contend.

But whatever may be the effects attributed to a suit in *personam* after a foreclosure, as to reviving the equity of redemption, such effects can be allowed in chancery only when it acts upon its own peculiar principles, unaffected by statutory provisions. In *Massachusetts*, where this mortgage was executed and enforced, and of course,

by whose laws it is to be regulated, the equity of redemption is limited to three years after possession obtained, and negatived afterwards by the express provisions of the statute.¹³ The foreclosure therefore, once complete, fixes the absolute rights of the parties, and no subsequent event can control or alter their legal efficacy.

To return; whatever may be the differences of opinion among the learned chancellors on other points, the foregoing examination abundantly shews, that they all proceed upon the supposition, that at law a foreclosure of the mortgage is no bar to an action on the attendant bond; and that equity alone can afford relief by acting on the conscience of the creditor, and decreeing a perpetual injunction.

Sitting then in a court of law, we should have no difficulty, even if this were a case *prima impressionis*, in holding, that the plea is bad, and that the demurrer must be sustained. Our judgment would be, that upon principle the mortgagee must be entitled to recover on the note in damages the deficiency of the mortgaged property to pay the debt, calculating its value at the time of the actual extinction of the equity of redemption; and that, even admitting the foreclosure to be a purchase of the property, in no event could the purchase money be deemed to exceed the debt.

But this question has been solemnly adjudged in the state, where this contract of mortgage was made and to be executed. In *Amory vs. Fairbanks*, in 1793, the Supreme Court of *Massachusetts* decided, upon a special plea like the present, that the bar was bad, and the mortgagee entitled to recover the deficiency of his debt, notwithstanding the foreclosure.¹⁴ At the distance of

¹³ Stat. 1 March, 1799, ch. 77.

¹⁴ 3 Mass. R. 562.

fourteen years, this decision was cited and approved by the same court, and may now be considered as the settled law of that state.¹⁵ Such an authority, even if not binding on this Court, is so conformable with principle and so highly respectable in itself, that it is not easy to shake its force.

It has been argued, that the creditor might in *Massachusetts* have first sued his note, and levied his execution on the mortgaged estate at its appraised value, and thereby have avoided the ill effects of a foreclosure, if the estate was of less value than the debt, and that therefore there is less reason to hold him entitled to recover, when he elects a foreclosure in the first instance. But is it quite certain that the mortgagee would in *equity* be allowed in this way to avoid the mortgage? And even if he might, still it might well admit of doubt, how far such a proceeding extinguished his mortgage, so as to let in other intermediate incumbrances and attachments on the estate. If the defendant's argument be correct, the election of a personal suit would amount to a waiver of the mortgage, whether the execution were levied on the mortgaged property, or remained unsatisfied. Yet authority does not seem to countenance such a principle.¹⁶

There are some other views of this case, which, if the principal point admitted of doubt, might deserve consideration. The suit is upon a judgment of another state, and must have all the validity and conclusiveness here, that it has there.¹⁷ If the plaintiff was bound by his election to foreclose the mortgage, that election had been made previous to the original suit, and might have been pleaded in bar to it; and the neglect so to do cannot now be help-

¹⁵ 3, *Mass. R.* 154.

¹⁶ See *Bantleon vs. Smith*, 2 *Binn. R.* 148.

¹⁷ See 3 *Cranch, R.* 29.

Hatch vs. White.

ed. If, on the other hand, the bar did not arise until after the election so made and an actual extinguishment of the equity of redemption, then, by the law of *Massachusetts*, it was no defence against a suit on the judgment.—On the whole, we are of opinion, that the demurrer is well taken, and that judgment on this plea must pass for the plaintiff.

Plea adjudged bad.

Pitman for the plaintiff.

Humphreys and *E. Cutts* for defendant.

CIRCUIT COURT OF THE UNITED STATES,

MASSACHUSETTS, OCTOBER TERM, 1814, AT BOSTON.

BEFORE } Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
 } Hon. JOHN DAVIS, District Judge.

THE SARATOGA, KEATING CLAIMANT.

A capture, unless followed by condemnation, does not dissolve the contract for mariners' wages. During the prize proceedings it is suspended, and upon a decree of restoration it revives.

If, pending the voyage, there be an interdiction of commerce with the port of destination by war or otherwise, and in consequence the voyage is broken up, no wages are due. But if the mariners be subsequently retained by the master to reef and preserve the ship, they are entitled to a reasonable compensation in the nature of wages. And if afterwards discharged in a foreign port, the mariners are entitled to the two months pay provided by the act of congress of 28th of February, 1803, ch. 62, and may recover it, if unpaid, by a suit in the admiralty.

At what time, after a capture, seamen may lawfully quit the ship.

There are some exceptions to the rule, that, to entitle to wages, freight must be earned.

THE libellants shipped, as mariners, on board of the ship *Saratoga*, on a voyage from *Boston* for *Amelia Island*, at and from thence to port or ports in *Europe*, and at and from thence to her port of discharge in the *United States*. The ship sailed from *Boston* in October, 1811, for *St. Mary's*, where she took in a cargo, and thence proceeded to *Portsmouth* in *England*, where her cargo was discharged. The agents of the owners having engaged a

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cargo on freight, at *Londonderry* in *Ireland*, for the *United States*, the ship sailed in ballast for that port on the 23d of April, 1812, and, on the 28th of the same month, was captured by the French privateer *Espadon*, and carried into *Roscoff* in *France* for adjudication. Prize proceedings were here instituted against the ship and her hatches sealed, and all the crew, except the mates, who were permitted to remain on board, were sent to *Morlaix* as prisoners. In August, 1812, the captain came down from *Morlaix* with all the crew excepting three, and by permission, they were there employed fifteen days in tarring the rigging and other ship's duty, and at the end of that time the crew returned to *Morlaix*. The ship was restored to the captain by order of the court, and taken possession of by him, on or about the first of January, 1813. On the 4th of the same month, the crew came on board, and went to work graving and painting the ship; and on the 7th of the ensuing February, the ship sailed for *Morlaix*, and arrived in the roads there on the same day; but did not get up to the town until the 1st of March following. The crew remained and slept on board until about the middle of July, in the same year, doing duty as required by the officers, and then left the ship, with the consent of the captain and the American consul, and sailed in a cartel for the *United States*. During the time of detention under the prize proceedings, the crew were principally maintained by the French government, and the expense, at the restitution, was made a charge on the ship. The crew, frequently during their residence in France, applied to the captain for their wages and discharge. The captain as often told them, that they might go where they pleased, but he had no money to pay them their wages, and they might, if they pleased, arrest the ship, and he would not oppose them. But they did not choose to leave the ship without payment of their wa-

ges, and the captain, from time to time, permitted them to go on shore and work, whenever they could get employment. He seemed, however, to have exercised his control over them, and declared, that if they worked on board of the cartel before their discharge, their wages would be forfeited.

After the discharge of the crew, the *Saratoga* was finally made a cartel, to carry prisoners to *England* at a stipulated price ; and from *England* she came with prisoners to the *United States*, where she arrived on or about the 2d of September, 1813. For this last voyage no compensation had as yet been received.

The libellants had been paid their full wages up to the time of the ship's departure from *Portsmouth*, and now claimed wages from that time to the time of their discharge in *France*, and, in addition, the two months pay provided by statute of the 28th of February, 1803, ch. 62, sect. 3, in cases of the discharge of seamen in foreign ports.

Selfridge, for the libellants. This case is similar in principle to that of *Brooks vs. Dorr*,¹ and the cases there cited, the ship having been restored, and having returned in safety to the *United States*.

That the capture occasioned the loss of freight is not an objection to the right of the libellants to wages, for

1. The legal presumption is, that the *Saratoga*, sailing from *Portsmouth* to *Londonderry*, would not have been captured by a friendly power, unless for some illegal act, which must have been committed by the owner or master, and by which the seamen ought not to suffer.

2. But, if the capture was wanton and without cause, then compensation is to be looked for from the French

¹ 2 Mass. Rep. 39.

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government, whose courts will give damages in lieu and in the nature of freight.

3. If compensation should be unjustly refused by the French courts, then it becomes the duty of the government of the *United States* to furnish a complete indemnity to its citizens, whom it is bound to protect.

Many cases shew, that the maxim, "freight is the mother of wages" must be taken with considerable allowance. The seamen are entitled to their wages in many instances, though no freight be earned, if they stay by the ship and do their duty ; as, in this case, if after the arrival of the ship at *Londonderry* the passengers had refused to go on board ; or if, at *Amelia* Island, she could not have obtained a cargo ; and in the cases not unfrequently happening, where ships seek a freight abroad, and in consequence of short crops, or some other cause, obtain none. So in case of wreck, the freight is lost ; but the seamen are entitled to wages, if there is enough saved to pay them.² And this is not by way of salvage. Seamen can in no case be considered as salvors.

But if the seamen are not entitled to wages for the whole time, they are at least entitled to the two months pay claimed in the supplemental libel, by virtue of the statute of the *United States*.³ The mere capture did not dissolve the contract between the master and mariners. The latter remained attached to the ship, and being voluntarily discharged in a foreign country, the captain was by that act bound to pay three months wages to the consul or agent of the *United States* at that port, of which, on their taking passage to return to the *United States*, they are to have two thirds, and the remainder is to be left as a fund. This sum having been due in *France*, and not having been paid, the libellants have a right to recover it here.

² *Frothingham vs. Prince*, 3 *Mass. R. Appendix*, 563.

³ *Act 26th February, 1803, ch. 62.*

Hubbard, for the claimant. 1. The contract for wages is contingent.⁴ It is a rule, to which, however it may appear in some few cases to have been controlled, it will be safest for the Court to adhere, that if the freight is lost, no wages are earned. To produce the loss of wages, it is not necessary that the ship itself be lost. Whenever the voyage is destroyed, there is no title to wages.⁵ It is true that a temporary suspension will not have this effect, but in all cases *the specific voyage*, for which the seamen engaged, must be ultimately performed.

It was to mitigate this rule, considered as in many instances a hard one, that courts apportioned the voyage, and allowed wages, whenever the ship has arrived at a port in the course of her voyage, and has delivered, or might have delivered, a cargo.

[*STORY, J.* This is a part of the general rule, and contemporary with it. It results from the general law, by which wages are to be paid, wherever freight might have been earned; the mariners not being affected by any special contract of the owner.]

It is impossible to conceive a stronger case than the present, in which the vessel was captured and detained until a war broke out between her country, and that to which she was bound; thereby rendering it impossible and unlawful for her to proceed thither. No services have been rendered by the seamen, from which any benefit has resulted to the owners.

2.—In case of capture and recapture, the wages of the sailors must contribute to the salvage paid.⁶ Upon the same

⁴ *Abb. 507, (444)*—1 *Peters*, 125.—3 *John*, 154.

⁵ *Beale vs. Thompson*, 4 *E. R.* 562.—*S. C.* 3, *B. and P.* 428.—*The Friends*, 4 *Rob.* 143.—*Curling vs. Long*, 1 *B. and P.* 637.

⁶ *Abbott*, 508. (444.)—*Beale vs. Thompson*, 3 *Bos. and Pyl.* 405.

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principle they must contribute to expenses, when a restoration is obtained by judicial decision. If this position is true, and if the seamen were entitled to wages in *France*, and to receive them out of the ship, then their proportion of expenses would absorb all their wages; the whole expenses having exceeded the value of the ship in *France*. The seamen are not to profit by the increased value here, which is not owing to their exertions; they are to be in the same condition, in which they would have been, had the ship been sold in *France*, in which case the whole would have been consumed.

3. The seamen have no title to the two months wages provided by the statute of the *United States* referred to, that statute being necessarily confined to cases where wages are actually due, and not intended to give them in cases, in which they would not otherwise be recoverable. Nor was this such a voluntary discharge, as is contemplated in the act; the master was compelled to permit the departure of the seamen, in consequence of his want of funds.

Prescott, (on the same side.)—Though a blockade is not of itself a cause of abandonment, yet if the vessel be detained by a cause within the policy until a blockade takes place, the voyage is considered as defeated by the original cause of detention, and it is a total loss upon an abandonment.⁷ So in this case, the ship having been detained by the capture until the war broke out, the voyage must be considered as defeated by the capture.

This is an inequitable attempt of the seamen to throw upon the owners the whole loss incurred in an adventure, in which all were alike embarked. The wages to the time of sailing from *Portsmouth* have been paid. If no

⁷ *Barker vs. Blakes*, 9 E. R. 294.—*Richardson and al. vs. Maine Insurance Company*, 6 Mass. R. 120.

voyage has been performed since that time, no wages are due. The ship sailed on a voyage from *Portsmouth* to *Londonderry*, and thence to the *United States*. If this voyage has been performed, and the seamen have remained by the ship, and done their duty, they are entitled to wages. Otherwise, they are not.

1. If a ship is captured, and carried in for trial, the seamen are not entitled to wages, unless they remain by the ship to the completion of the voyage.

The immediate effect of a capture in regard to the rights and duties of sailors is not perfectly settled, the decisions in some measure conflicting with each other. The general position is, that by capture and carrying into a place of safety all contracts are dissolved. But this perhaps is rather too strong; the contract is only placed in a situation to be dissolved. Ships are often detained, one, two, or three years. The seamen cannot be required to stay longer, than is necessary to give their depositions, and to prepare for the defence of the ship.* If then the sailors have an option to quit the ship, and determine the contract, the master must have the same. The contract cannot be suspended on one side only. If the seamen may quit, the master may dismiss.* If the contract be once suspended, and the seaman leaves the ship, it may be revived again by his returning and resuming his duty, and the ship's being finally released. But what has here been done, to revive the contract? In order to this, the seamen must return, be received, and perform duty to the end of the voyage. From the time of the ship's arrival in *France* to January, the contract was suspended, and it was in the power of either party to dissolve it. The master's deposition shews that he did dissolve it.

* *Lemon vs. Walker*, 9 Mass. R. 404.

* *Beale vs. Thompson*, 3 Bos. and Pul. 405.

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After the restoration of the ship, was any thing done to revive the contract? The ship could not perform the voyage intended. The master was the only judge of the propriety of leaving *France*. To entitle themselves to wages, therefore, the seamen must remain by the ship till the end of the war, or till the master should judge it prudent to leave *France*, and complete the voyage. But they had an option to leave the ship, and they did so. Nor can they claim wages to the time of their leaving the ship. Had the incapacity, existing at the time of their departure, been afterwards removed, and the voyage performed by the help of a new crew, what was thus done by the services of the new crew could not give the old a title to wages, which they would otherwise have lost.

2. The voyage being defeated by a *vis major*, the seamen lose their wages. This results from the general maxim, that "freight is the mother of wages."

This is a reasonable provision in itself. It would be a hardship upon the owner to be compelled to pay wages for a voyage, in which he has lost his freight, and which has been broken-up by a misfortune, that should be common to all engaged in the adventure. All the cases, that have been supposed on the other side, are where the voyage is performed, and the freight not prevented from being earned by a *vis major*, but by some other cause. In every case, where the ship arrives and performs her voyage, but from accident or *vis major* earns no freight, (as if the cargo be destroyed by tempest,) no wages are due. It is true, that if the seamen by their exertions save the ship, and bring her into port, they are entitled to salvage. This is often, but incorrectly, called wages.¹⁰ The stipulated wages may be the measure of compensation, but they are not given as wages.

¹⁰ Ch. Just. *Kent's opinion*, 3 John. Rep. 154.—*Frothingham vs. Prince*, 3 Mass. R. App. 563.

The facts in the case abundantly shew, that this voyage was defeated. The ship was captured on her passage for *Londonderry*, and carried into *France*. Here was a *vis major*. When she was liberated, a war had commenced between the *United States*, and the country to which she was bound. The ship then could not be in a capacity to perform the voyage. And even had she been so ; had she been a neutral ship, and the captain willing to go ; still the seamen, being Americans, could not lawfully have gone.

This case has been compared to the doctrine of insurance, adopted both in *England* and in this state, that even a war does not, as respects insurers, justify a breaking up of the voyage. But this will not apply to seamen, who have a contract to perform, of which the performance has by war become unlawful. This however is a case of a different kind. The voyage was defeated by an accident out of the control of the master or crew ; by capture and detention. The subsequent incapacity, arising from hostilities, must, according to the English cases, be ascribed to the original detention.

3. Great expenses have been incurred, to effect the liberation of the ship and cargo. For the same reason, that in cases of capture and recapture, the seamen must contribute to the salvage, in the proportion that the sum paid bears to the whole ; they must contribute in this case, in which expenses have been incurred for the common benefit, and to prevent a condemnation, which they were interested to prevent. These expenses amounted to the whole value of the vessel in *France*.

4. As to the supplemental libel ; the intention of the law of the *United States*, on which it is founded, was to secure sailors against the effects of their own improvidence, as they might often consent to be discharged to their great

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injury. It is therefore provided, that the master shall pay to the consul three months wages. It is a thing, over which the seamen have no control. The consul only can claim this sum. There is no contract with the seaman to pay him the two months wages.

This law was also intended to deter the master from selling his vessel, or discharging his sailors, in a foreign port. It cannot apply to a case of *necessary* discharge, but only to those of a *voluntary* discharge, not produced by any accident or *vis major*.¹¹

Selfridge, in reply. This is a strong case of equity in behalf of the seamen, since their conduct has been faithful. The general policy of the government having been to protect this class of men, and to exercise a sort of guardianship over them, the court will adhere to this policy, whenever no particular objection appears against it.

1. To the general doctrine, that "freight is the mother of wages," there are exceptions. Suppose, for instance, an American ship, before the war, bound to *England* and laden with enemy's property, is carried into *France* and condemned, the freight however being allowed; that while there detained a war takes place between this country and *England*; the ship then cannot earn a freight home from *England*, as intended; yet the seamen are entitled to their wages, if the ship returns home in safety.

In the case of *Frothingham vs. Prince*, the seamen received their wages out of the remnant of the wreck, after paying the salvors.

Admitting that, when the ship was carried into *Roscoff*, it was, after a reasonable time, at the option of the seamen or master to dissolve the contract, of which it was the duty

¹¹ *Pothier, Des loyers de Matelots, No. 180, 182.*

of the master to inform the seamen ; still this has not been done. Many circumstances in the case shew, that the master, so far from dismissing the seamen, still required their services, and considered them attached to the ship. He even prohibited their leaving him to go on board an American privateer, or the American cartel.

The case of *Brooks vs. Dorr* shews, that a dissolution is not so easily effected between the master and seamen, as between underwriters and insured. There may be a right to abandon, and seamen still have a right to recover their wages.

2. If the voyage has been broken up or defeated, it was by the fault of the owners. Going from port to port of the enemy's country was the suspicious cause, which induced the capture. Had this been known to the seamen, they would not have gone.

3. If the seamen would have been entitled to full wages in case of their remaining on board, and performing the voyage, they must, on the same principle, be entitled to wages *pro rata* to the time of their discharge by mutual consent. At any rate, they are entitled to wages from the 1st of January, when the captain ordered them to go to *Morlaix* to work, to the time of their discharge.

4. As to salvage ; the seamen are not liable to contribution, in case of a capture or detention by a friendly power, or if the capture be caused by the fault of the owners.

5. As to the two months wages claimed by the supplemental libel ; the object of the law was, to encourage the return of seamen by a bounty. It is said, there is no contract ; but to this it may be answered, that the law itself raises a contract.

STORY, J. (after reciting the facts.) ' The question for the consideration of the Court is, whether the libellants

are entitled, under all the circumstances of the case, to any wages beyond what they have already received? and if so entitled, for what period wages are to be allowed?

It is argued, on behalf of the respondents, that the libellants have no farther claim for wages, no freight having been earned, and the voyage having been, by the capture and subsequent declaration of war between *Great Britain* and the *United States*, completely broken up and defeated.

The general rule is often asserted, that to entitle the seamen to wages, freight should be earned on the specific voyage, for which they engage; and that if, by any disaster happening in the course of the voyage, the owners lose their freight, the seamen also lose their wages.¹² The reason or policy of the rule is alleged, in 1 *Siderfin*, 179, to be, that if, in case of the loss of the ship by tempest, enemies, &c. the mariners were to receive their wages, they would not hazard their lives for the safety of the ship. The rule itself also is not without exceptions; if the voyage or freight be lost by the negligence, fraud or misconduct, of the owner or master, or voluntarily abandoned by them; if the owner have contracted for freight upon terms or contingencies differing from the general rules of maritime law; or if he have chartered his ship to take a freight at a foreign port, and none is to be earned on the outward voyage; in all these cases the mariners are entitled to wages, notwithstanding no freight has accrued.¹³ Reasonable however as the rule may seem to be, under these limitations, to those who are conversant with the maritime law of *En-*

¹² *Abbott on Shipping*, P. iv. ch. 3, § 1.—*Hoyt vs. Wildfire*, 3 John. R. 518.—*Dunnett vs. Tomhagen*, 3 John. R. 154.

¹³ *Hoyt vs. Wildfire*, 3 John. R. 518.—*Hindman vs. Shaw, Peters*, R. 264.—*Brig Cynthia, Peters*, R. 203.—*Peters*, R. 186, note.—*Abbott*, P. iv. ch. 2, § 5.—*Mahyne*, 195.—*Mellay*, Book 2, ch. 3, § 7.—*Moran vs. Baudin, Peters*, R. 415.—*Roccus de Nav.* n. 43.

gland, it does not seem to have obtained the universal sanction of the commercial world, though it has the weight of the authority of *Bynkershoek*¹⁴ to support it. *Roccus*¹⁵ holds, that wages are due, notwithstanding the voyage is not performed, if it happen from any fortuitous occurrence, and the mariner is not in fault. *Cleirac* seems silently to adopt the regulations of the ordinance of Philip II. as reasonable,¹⁶ and *Pothier* considers that maritime contracts, subject to few exceptions connected with the French ordinances, are governed by the same principles as other contracts of hire, and consequently that if, after its commencement, a voyage be defeated by accident, or superiour force, the mariners are entitled *pro rata* for their term of service.¹⁷

It has been argued, that the capture put an end to the contract for wages, and therefore that no services, performed afterwards, can entitle the libellants to recover wages upon the footing of that contract. Admitting that capture, followed up by condemnation, would extinguish such contract, still such effect cannot be attributed to a capture, where there has been a recapture or restitution. And notwithstanding some contrariety of opinion, it may be safely affirmed, that such capture operates, at most, but to suspend the contract, and that, by restitution or recapture, the parties are remitted to their former rights in the same manner, as if no such interruption had occurred.¹⁸

It has been farther argued, that by the capture the relation between the owners and mariners ceases ; so that the

¹⁴ Q. P. J. cap. 13.

¹⁵ De Nov. n. 43.

¹⁶ *Cleirac, Jugemens d'Oleron, Art. 19. § 3.*

¹⁷ *Pothier, Louage des Matelots, 179, &c. 198, 203.*—See also *Abbott, P. iv. ch. 2, § 6.*

¹⁸ *Beale vs. Thompson, 4 East. R. 546.*—*Brooks vs. Dorr, 2 Mass. R. 29.*

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latter are not bound to remain by the ship, but are at liberty, without the imputation of desertion, to abandon the voyage. Without deciding, whether the rule assumed in some of our own courts be not more reasonable, that the mariners are bound to remain by the ship until a first adjudication,²³ it is clear, that the mariner is not bound to leave the ship. He has a right to remain by her, and wait the event. If restored, he is entitled to his wages, if the ship proceed and earn a freight; if condemned, he may lose his wages, though perhaps, under circumstances, with a recompense for his actual services, pending the prize proceedings. And this doctrine seems founded in the interests of all parties. It would, indeed, be highly injurious to commerce, to establish, that in every case of capture, upon whatever pretence, or however unfounded, the mariners were obliged immediately, without waiting the event, to quit the ship in a foreign port.²⁴ It would often expose the owner to a loss of the voyage, from the difficulty of obtaining a new crew, or to extraordinary expense in securing his property. On the other hand, the mariners would be no less exposed to inconvenience. They might be turned ashore without money or credit, in a foreign country, against the manifest policy of our laws. It would seem fit, therefore, to hold, that a contract entered into by mutual consent

²³ *Brig Elizabeth, Peters, R. 123.*—And see *Lemon vs. Walker, 9 Mass. R. 404.*

²⁴ In the Ordinances of the Hanseatic Towns, Art. 49, we find the following provision in relation to this subject. "If the ship is arrested in a foreign country, or the master is obliged to wait for his freight, or to tarry from any other cause; during all such delay, the seamen shall be nourished as usual, but without having any pretence or demand for extraordinary wages; and if they are entitled to any thing, they shall be paid at the port, where the ship shall discharge, according to the award of experienced men and common friends. But if any seaman shall be so bold, as to abandon the ship upon this pretext, he shall suffer a corporal punishment, according to the exigency of the case."

should not be dissolved unless by that consent, until such proceedings were had, as left an ordinary hope of recovery in the original tribunal of prize.

Upon the principles, then, which have been stated, the capture did not dissolve the contract for wages; at most, it was but suspended during the prize proceedings, the event of which the parties had a right to await; and by the subsequent restoration of the ship, the contract revived in its full force, and remitted the parties to their former character and right. If the ship had then been in a condition to perform her voyage, and had actually performed it, there can be no doubt, that they would have been entitled to their full wages during the whole time of service.²¹

But, at the time of the restoration of the ship, war existed between Great Britain and the United States; and the farther prosecution of the voyage was not only impracticable, but highly criminal in both parties. The legal effect, therefore, of such an interdiction of commerce, was to absolve both parties from any farther performance of the contract.²² The question then arises, whether a loss of the voyage, in consequence of an interdiction of commerce after its commencement, deprives the owner of his freight, or the mariners of their wages?

It seems to be a doctrine of our law, that if a voyage be broken up, by an interdiction of commerce with the port of destination, after its commencement, no freight is payable. And the same rule is applied to cases, where the voyage is lost by accident or superiour force.²³ In short, the principle seems to be, that there must be an actual de-

²¹ *Bottle vs. Thompson*, 4 East, R. 546.

²² *Abbott, P. III. ch. 1. § 3.*—*Scott vs. Libby*, 2 John. R. 336.—*The Tutela*, 6 Rob. 177.

²³ *Osgood vs. Groning*, 2 Camp. R. 466.—*Diddard vs. Lopes*, 10 East, R. 626.—*Scott vs. Libby*, 2 John. R. 236.—*Abbott, P. III. ch. 1. § 5, Id. ch. 11, § 2.*—*The Hiram*, 3 Rob. 169.

Severage.

loss of the cargo at the port of destination, to entitle the party to his full freight.²⁴ If, indeed, there be a voluntary acceptance of the cargo at an intermediate port, and a dispensation of proceeding farther, then a *pro rata* freight is due.²⁵

In these respects our law appears to differ from the maritime law of other countries. *Roccus*²⁶ declares, that if the ship has begun her voyage, and from accident is prevented from completing it, freight is payable for the part of the voyage actually performed. This also is the opinion of *Straccha*,²⁷ and seems, with some distinctions, to be adopted in the maritime regulations of *France*.²⁸ Indeed, in the case of an interdiction of commerce after the voyage is begun, the full freight for the outward voyage is allowed.²⁹

If we pass from the consideration of freight to that of wages, we shall find, as I have already stated, that foreign writers do not consider that wages are wholly lost, but recoverable *pro rata itineris*, where the voyage has been in part performed, and its farther accomplishment has been prevented by inevitable casualty or superior force.

As to an interdiction of commerce with the port of destination, occurring in the voyage, *Cloirac*³⁰ adopts, with apparent approbation, as conformable to the civil law, the regulation of Philip II., that the mariners shall, in such case, receive a quarter part of the wages agreed upon for

²⁴ *Richardson vs. Maine Ins. Com.* 6 Mass. R. 102—112.

²⁵ *Lake vs. Igde*, 2 Burr. 832.—*Idlard vs. Lopes*, 10 East, R. 526.—*Osgood vs. Groning*, 2 Camp. 466.

²⁶ *De Nav.* n. 54—n. 81.

²⁷ *De Nav.* part 3, sec. 24.

²⁸ *Pothier Charit Partie*, n. 68—69.—1 *Emerig.* 544.—1 *Valin. Com.* 656.

²⁹ *Emerig.* 544.—1 *Valin. Com.* 656.—*Pothier Charit Partie*, n. 69.

³⁰ *Jugemens d'Oleron*, art. 19, § 3, § 4.

the whole voyage.²¹ The French ordinance²² declares, that, in the like case, the mariners shall be paid in proportion to the time they have been in service, and this, *Pothier* says, is conformable with the general rules of the contract of hire.²³

No case has been cited, in which this point has been settled in our own courts; and, as far as I have been able to ascertain, after a pretty diligent search, it yet remains for a decision in our maritime law. But if the doctrines already settled in relation to freight are to apply, and it seems impossible to distinguish them, the interdiction of commerce must be deemed to dissolve the contract, and leave the mariner without any title to wages *pro rata itineris peracti*. Indeed, the moment it is held, that, where freight by the general law is not earned, wages are not due, the case falls directly within the authorities, which have been already examined.

My opinion as to this point, therefore, is, that war existing at the time of the restoration of the ship, and the farther prosecution of the voyage being illegal, the original contract was completely dissolved, and up to that time no farther wages were due. If the case had rested here, the claim for wages must have been repudiated.

But the mariners, with the consent of the master, came on board, and did duty from the time of the restoration of the ship, until their final discharge. It was clearly competent for the master to hire and employ a crew for the preservation and equipment of the ship, and the services so performed cannot, by any reasonable construction, be referred back to a contract, which then had no legal existence. The libellants then must be deemed to have gone

²¹ *Dig. lib. 40, tit. 2, l. 15, § 5.*

²² *Des Loyers de Matelots, art. 4.*

²³ *Pothier, Louage des Matelots, 180.—1 Valh. Comm. 628.*

 Summa.

on board, and to have done duty, under an implied contract to receive a reasonable recompense, in the nature of wages, *pro opere et labore*. Upon the footing of this new contract, I have no difficulty in sustaining their claim for wages, during the time of their connexion with the ship after restoration. Full wages, however, ought not to be given for this period, because the services performed or required were not equal to the usual services in the progress of the voyage. In case of detention, under the arrest of a sovereign, the French ordinance^a provides, that the mariners hired by the month, shall be entitled to a moiety only of their wages during such detention. Under all the circumstances of this case, I shall adopt this as an equitable rule, and shall decree wages accordingly.

The next question that arises is, whether the libellants are entitled to the two months pay under the act of the 28th of February, 1803, ch. 62. The third section provides, that whenever an American ship shall be sold in a foreign country; or an American seaman shall, with his own consent, be discharged in a foreign country, the master of the ship shall pay to the commercial agent of the United States, for every seaman so discharged, three months pay, over and above the wages due to such seaman, two thirds thereof to be paid to such seaman on his engagement on board of any vessel to return to the United States, and the remaining third to be retained for a fund to relieve destitute American seamen. I agree with the counsel for the respondents, that the cases here alluded to are cases of voluntary discharge, and not cases, where the discharge has resulted from inevitable necessity or superior force, such as a total loss by capture, tempest, or other fortuitous occurrence. But I can, by no means, admit, that the present case comes within the exception.

^a Des Loyers des Matelots. Art. 5, Vain Comm. 6, 190.

The ship was in a capacity to return home, or perform any lawful voyage, and, at the time of the discharge, the libellants were attached to her service. The case falls, therefore, within the words and the mischiefs of the statute; and though the money is required to be paid into the hands of a public agent for the use of the libellants, yet as they did all the acts, which gave them a perfect title to it, and it was not paid, this Court will enforce this title directly against those, who were circumtously compellable to pay it. The two months wages, however, are to be calculated, not on the original wages; but on the wages growing out of the new contract of hire.

Before I close this opinion, I will advert to one or two considerations, which have been thrown out in the argument. It has been argued, that if the seamen were entitled to wages, they were bound to contribute towards the expenses of procuring the release of the ship, as a general average.—But I know of no rule of law, which subjects the seamen to contribution in such a case. The general doctrine is, that they do not contribute to general average. The only admitted exception is in case of ransom, and, perhaps, by parity of reasoning, of recapture.²⁵ If the doctrine were otherwise, it would not apply to the present case; for the wages to contribute must be those, which are saved by the expenses incurred; and not the wages accruing under another contract. Here the very subject matter for contribution was totally lost.

It has been argued, on the other side, that a capture of a neutral by a belligerent differs from capture by an enemy as to its effects; that it either affords *prima facie* evidence of illegal conduct in the neutral, which subjects him to condemnation, and such conduct ought not to affect seamen, who are innocent parties; or such capture is

²⁵ *Abbott, P. III. ch. 8, § 14.—Id. P. IV. ch. 3, § 2. The Friends, 4 Rob. 143.—1 Emer. 642.—1 Valin, Comen. 752, 701.*

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wrongful, and the owners are entitled to damages equivalent to the freight. It might be a sufficient answer to this argument, that no such distinction, as to legal effects, has as yet been recognised; and so far as authorities proceed, they indiscriminately apply to neutral, as well as enemy's captures; and farther, that if the voyage be not performed, and freight be not in fact allowed, by way of damages, restitution, which may arise without any default of the owner, he would be compelled to pay wages, where the general law had, as a case of the *vis major*, exempted him.

The case also of *Pyolkingham vs. Prince*,²² has been pressed upon the Court, as a direct authority to prove, that the payment of wages does not depend upon the earning of freight, if the ship, or any of her materials equal to the wages, remain after the voyage. That case is very imperfectly reported. I have, however, examined the original record, and from a memorandum on it, I find the full wages for the homeward voyage were allowed, although the cargo was totally lost by shipwreck, and the ship herself was so much injured, that the materials sold for little more than the wages. No reasons are given for this decision, and, perhaps, it may have turned, as the defendant's counsel have suggested, upon the ground, that under the circumstances, the seamen were entitled to a salvage equal to their wages.²³ If, however, it be incapable of this explanation, as I confess, from the examination of the record, I think it is the most that can be said is, that it is a single case standing alone against the current of authority.

Decree of the District Court reversed.

Schridge for the libellants.

Prescott and Hubbard for the respondents.

²² 3 Mass. R. 463.

²³ *Coffin vs. Storer*, 5 Mass. R. 252.—Abbott, P. IV. ch. 2, § 6.

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²⁶ 3 Mass. R. 463.

²⁷ *Coffin vs. Storer*, 5 Mass. R. 252.—Abbott, P. IV. ch. 2, § 8.

captors. Is it not absurd, to call that an equal division, by which the *United States* take first one half as duties, and then one half of the residue? There are many other considerations, which support this view of the law. 1. The goods, when captured, belong until condemnation to the *United States*, who cannot secure or pay duties to themselves. 2. The effect of such a requisition would be, that captors, instead of bringing in, would destroy every prize, by which means the calamities of war would be increased, and the *United States* would be deprived of their moiety. 3. It was not intended to add to the revenue by the proceeds of prizes, but, on the contrary, the moiety accruing to the *United States* is appropriated to form a fund for the encouragement of merit and relief of disabled seamen.³ 4. By this means privateers would be encouraged at the expense of the navy, which could not be the intention of Congress. In remitting the double duties to privateers, the intention probably was to prefer them to merchant vessels; but the navy would be favoured more than either.

If, however, goods captured by public ships are, notwithstanding these reasons, held to be subject to duties, it is submitted with confidence, that duties are to be charged upon the moiety only.

Blake, District Attorney, for the *United States*. My official duty compels me, in this case, to a course entirely different from that, which my feelings would suggest. I should rejoice, if the laws were such, as to exempt from duties prizes made by the navy. But I am apprehensive, that it is otherwise, and that the legislature only can afford relief. The misfortune seems to be, that the revenue laws are calculated for a state of peace, and

cannot, without amendment, be made to suit with the exigencies of war.

The act, by which duties are imposed, has not been adverted to by the counsel for the appellant. He has confined his remarks to the act regulating the collection of duties. By the first act,¹ all goods imported into the *United States* are made subject to duties, unless specially excepted. It is true, that all the regulations for enforcing the payment of duties appear to relate to common and ordinary importations only, and to be inapplicable to public ships. The reason is obvious. It was not anticipated, that goods would ever be imported in a public armed ship. But the late acts of Congress shew, that prize goods are not supposed to be excepted from the revenue laws. By a statute recently passed, the double duties on prize goods were remitted, and in the law concerning letters of marque, &c. ² owners and commanders of privateers are made subject to the same penalties and forfeitures for a violation of the revenue laws, as attach to merchant vessels in the like cases.

No real difficulty exists, as to the manner of entering the goods and securing the duties. All this may be done by the prize master. It is admitted, that such a regulation, as that the captain shall be subject to a penalty, if he does not make report, cannot, without absurdity, be extended to public ships. But it does not, by any means, follow, that because some parts of the law are necessarily confined to merchant vessels, all its other parts are to be construed with the same restriction,

The transshipment of the goods from the prize to the frigate was an irregularity, to be excused only by the necessity of the case. No exemption can be claimed on this ground, but the cause must stand upon the same foot-

¹ 1 U. S. L. 248.

² 11 U. S. L. 238, sect. 13.

ing, as if the goods had arrived on board of the *Liverpool Hero*, in the custody of a prize master.

STORY, J. The single question is, whether prize goods imported into the *United States* by a national ship, under the commission and authority of the *United States*, are liable to the payment of duties?

It is very correctly argued, that no duties are payable on goods imported into the *United States*, unless expressly provided for by statute. By the act of the 10th of August, 1790, ch. 39,^{*} certain duties are laid upon all merchandise not therein excepted, which shall be brought into the *United States* from any foreign port or place; and by the act of the 1st of July, 1812, ch. 112,[†] one hundred per centum is added to the then permanent duties. It is very clear, that goods belonging to the *United States*, and imported on their own account, in their own ships, are not within the purview of either of these statutes. Independent of the general doctrine, that the sovereign is not restrained by a statute, unless named in it, it is impossible to contend, that either these acts, or the acts made to enforce the collection of duties,[‡] can in common sense apply to the *United States*. It would be absurd to suppose, that the *United States* should pay duties to themselves; much more that they should give bond to themselves for duties, or for drawback, or should incur the forfeiture of their own goods by landing them without a permit.

By the general law of prize, all captures, made by the public armed ships of a nation, belong to the sovereign. By the prize law of the *United States*, after condemnation as prize, a moiety of the proceeds is distributed

* 1 U. S. L. 248.

† 11 U. S. L. 390.

‡ 2 March, 1790, ch. 128.—4 U. S. L. 305.

among the officers and crew, if the captured vessel be of inferior force, and the whole if of equal or superiour force, to the capturing ship.⁹ Still, however, the whole property is proceeded against in behalf of the *United States*, and no title vests in the captors, except to a distributive share of the proceeds after condemnation. Until such final adjudication, the captors have no interest, which the court can properly notice for any purpose whatsoever. The condemnation is, in terms, a condemnation to the *United States*; but it ensures for the benefit of the captors, and is distributed according to the provisions of laws.¹⁰ It follows from these considerations, that prize goods, imported into the *United States* in public ships, under the authority of the *United States*, are to be deemed an importation by the *United States*, and not by the captors. None of the rules, therefore, that apply to the ordinary importations of merchants, could govern in such a case.

If the present case, therefore, stood upon the general principles of law, I should have no difficulty in acceding to the argument of the appellant, that these prize goods were not liable to the payment of duties.

But it seems to me, that the present case is directly within the purview of a statute, which was not adverted to by the counsel on either side at the argument. I allude to the prize act of the 26th of June, 1812, ch. 107.¹¹ That act (sect. 14) after exempting all prize goods captured from the enemy by private armed vessels, or by the vessels of war and revenue of the *United States*, from the operation of the non-importation acts, declares, that all such goods, when imported into the *United States*, shall pay the same duties, to be secured and collected in the

⁹ 23 Feb. 1800, ch. 33.—5 U. S. L. 108.

¹⁰ *The Elsie*, 5 Rob. 173.

¹¹ 11 U. S. L. 238.

same manner, and under the same regulations, as the like goods, if imported in vessels of the *United States*, from any foreign port or place, in the ordinary course of trade, are or may at the time be liable to pay. However incongruous, and I had almost said impracticable, it may be, to transfer the ordinary regulations of the revenue to prize causes, the intention of the legislature to make prize goods, imported in public ships, liable to duties, is sufficiently apparent in this language. I pretend not to solve, though I can readily foresee, the great difficulties, presented by this novel provision.

Admitting that duties are payable on such prize goods; by whom are they to be secured, and in what manner, and under what regulations? These questions are sufficiently embarrassing, but connected with another, *vis.* whether the whole goods are to pay duties, or the moiety belonging to the *United States* is to be exempted, they involve the mind in singular perplexity. If the payment of duties had been confined to that portion of such prize goods, which vests in the officers and crew, it might be possible to construe the act, as authorizing the security of the duties by them. But as to the portion belonging to the *United States*, it is difficult, as I have already stated, to conceive how the *United States* can either pay or secure the duties to themselves. It is farther to be considered, that this portion is pledged by the *United States*, as a fund for the payment of pensions to the navy, and that a construction, which would render it liable to the deduction of duties, would greatly diminish the amount devoted to this most meritorious purpose. I do not think, therefore, such a construction ought lightly to be admitted.

My opinion accordingly is, though I confess it is not unattended with difficulties, that duties are, in no event, to be deducted from the moiety belonging to the *United*

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States, but the same is wholly to accrue to the navy fund, and that the other moiety, belonging to the officers and crew, is subject to duties.

I shall direct the decree of the District Court to be conformed to this opinion.¹²

[¹² "If goods are taken as lawful prize upon the sea, and imported or brought into an English port, these prize goods shall pay customs inward; and accordingly it hath been resolved." *Hale on the customs*—*Harg. Law Tracts*, 214—*Ibid.* 224.]

THE JERUSALEM, CATARA CLAIMANT.

The Admiralty Courts of the *United States* will entertain jurisdiction *in rem*, to enforce a bottomry bond executed in a foreign country, between subjects of a foreign country, when the ship is within the territory of the *United States*.

In what cases suits will be maintained between foreigners in our courts, and in what cases they will be remitted to their domestic forum.

The jurisdiction of the Admiralty depends, not on the character of the parties, but on the subject matter, whether maritime or not.

An attested copy of a bottomry bond, executed in a distant foreign country, being produced by the libellant, a continuance was allowed, under the circumstances, to enable him to procure the original.

THIS was a libel against the polacre *Jerusalem*, a Greek ship, owned in part and commanded by the claimant.¹—The libellant, *Hugon Couturier*, alleged, that on the 30th day of May, 1812, he lent nine thousand nine hundred and fifty three dollars to the claimant, for the victualling, loading, and repairing of said ship, then lying in *Smyrna*, for which sum *Catara*, by his writing obligatory of the same date, a copy of which was produced, hypothecated to him her hull, tackle, cargo and freight. The premium was to be twenty per cent. if a sale should be effected in

¹ See the case of *Kleine vs. Catara*, ante page 61.

Malta or *Sicily*, thirty per cent. if in *Majorca*, *Minorca*, or other port of *Spain*, and forty per cent. if in *Lisbon*; the principal and interest to be paid, on the safe return of said vessel to *Smyrna*, or after the sale of her cargo 'at any other place. The libel then averred, that the ship had not returned to *Smyrna*, but had proceeded to *New York*, where her cargo was sold, and afterwards arrived at *Boston*, where she then was. The parties were both subjects of the Sublime Ottoman Porte, and the instrument of hypothecation was executed within the dominions of their sovereign.

The claimant appeared under protest, denying the jurisdiction of the Court, and setting forth the alienage of the parties.

Hubbard, for the libellant. The jurisdiction of the admiralty extends to all cases of bottomry, and it is no objection to that jurisdiction, that the contract was made in a foreign country, and between foreigners.*

Blake, District Attorney, for the claimants. It is not denied that this Court possesses, as a court of admiralty, all the jurisdiction, which belongs to the admiralty courts in England, and if in that country jurisdiction would be sustained in a case like the present, I shall not be disposed to contest it here. But it is believed, that on examination it will be found, that in cases between foreigners, the jurisdiction of those courts is never exercised, either as to the person or thing, except in the single case of salvage ;

* *Hall's Ad. Prac. part I. 25.*—*Bea's Rep. 223-4.*—*2 Cranch, R. 264.*
2 Brown's Ad. L. 119.—*4 Rob. R. 225, The Jacob.*—*3 Rob. R. 240,*
The Gratiudine.—*Emer. on Mar. Loans, 187.*—*2 Emer. on Ins. 383.*
2 Finn. 359, 386.—*Huberus, L. 5, Tit. 1. n. 50.*—*2 Domat, 674.*—
Bynk. de foro Leg. cap. 4.—*Casar. Disc. 43. sect. 53, Disc. 179, sect. 52,*
"hypotheca sequitur rem hypothecatam tanquam lepra leprosum."

an exception, which is founded exclusively upon reasons of policy.³

The admiralty jurisdiction is confined to cases, the character and circumstances of which are such, as to make them properly the subjects of that jurisdiction, and to admit of its being exercised without inconvenience.⁴ The courts of one country never take cognizance of controversies between the subjects of another, unless they concern lands lying within the country, to which the court belongs.

In cases of bottomry, indeed, if it appear from the instrument itself, that the voyage is to be terminated, and the money paid, in a foreign country, where the contract is sought to be enforced, the parties may then be considered as submitting, by the contract itself, to the jurisdiction of the foreign court. But the instrument, upon which this libel is founded, does not contemplate a voyage to the *United States*. The voyage is described as to the *West* generally, and different rates of premium are provided with a view to the ship's discharging, in several different places, the most distant of which is *Lisbon*. It was intended to end the voyage in *Smyrna*.

There is no analogy between this case, and those of salvage or rescue. Bottomry is a contract entirely municipal, and to be governed by the laws of the country, where it is made. The courts of that country only can determine the principles, upon which the rights of the parties are to depend; the process to be used, and the disasters, which shall excuse from payment. No case can be found in *England*, or our own country, where jurisdiction has been sustained between foreigners on a bottomry bond, unless

³ 2 Cranch, 242—9—264, *The Blaireau*.—1 Rob. 271, *The Two Friends*.

⁴ Vattel, B. 2, ch. 7, s. 84—85, ch. 8, sect. 103—104.

by the assent of parties, or when the voyage was there to terminate.

But even admitting that the comity prevailing among the nations, which compose the European commonwealth, would induce them to exercise such jurisdiction, in respect to one another, still this reason will not extend to the Ottoman empire. The *Jerusalem* is the first Greek ship that has visited our shores. To compel a sale of her would be received as a declaration of war. It would be highly impolitic to interfere in a case like the present, where the ship is of considerable value, and the owner a man of some note and consequence among his countrymen; more especially, as he has been long struggling to extricate his ship, and to carry her to the very door of this libellant. The same strict rules of law are not to be applied to the subjects of the Ottoman empire, as to those of other nations,⁶ and it is confidently hoped, that the circumstances of this case are such, as will induce the Court, if there be the smallest doubt of its jurisdiction, to send the parties to the tribunals of their own country.

Prescott, in reply. In cases of this nature, the Court is governed by the rules of the civil law, which are universal in their application. No principles are more generally known and received, than those which relate to the contract of bottomry. Commercial usage has made it cognizable every where. The remedy may, it is true, be personal, but in this case the thing pledged is the object of the suit. It resembles a real action, in which the tenant in possession is sued, but it is the land only, that is sought to be recovered.

No good reason can be given, why the Court should decline to interfere. Is there any thing in the nature of the

⁶ *La Madonna del Burso*, 4 Rob. R. 169.

contract? It is a maritime contract, which may be executed every where; upon which a court sitting in *America*, in *England*, or in *France*, is competent to decide. It is a stronger case than that of two foreigners making a contract to be executed here, which it is admitted might be enforced in our own courts. The ship is pledged for the payment of the money, whenever the voyage ends, or is deviated from. If a person, whose credit is pledged, may be followed, shall not the creditor be permitted to follow the thing pledged? The money is due, either because the voyage is terminated, or because there has been a deviation.

[*STORY, J.* In this preliminary inquiry, it must be presumed that the voyage has been completed, and the money become due.]

Blake contended, that this being a fact, which entered into the question of jurisdiction, it could not be taken for granted, but must be inquired into by the Court.

[*STORY, J.* On a question of jurisdiction, the Court will not inquire into the completion or non-completion of the voyage; that question belongs to the merits, and will be settled on a hearing, if the Court should decide, that it has a right to hear.]

STORY, J. It is not necessary, in this stage of the cause, to inquire into the exactness or regularity of the allegations of the parties. A preliminary question, as to the right of this Court to adjudicate upon the merits of the case, has been brought forward upon a protest to its jurisdiction, and after an ample discussion, remains now to be decided.

The question in short is this, whether the courts of the *United States*, in the exercise of their authority over causes of admiralty and maritime jurisdiction, have cognizance of maritime suits *in rem* between foreigners, whose permanent domicile is in a foreign country, when the specific property is within our territory. I state this as the general question, although in the acts of Court the parties have alleged facts, which, if proved, might perhaps somewhat narrow the discussion. But it is fit, that the general principle, that governs this class of cases, should be extracted from the embarrassment of minute circumstances, and examined in its more extended application.

Whatever may be the case as to other maritime contracts, respecting which I affirm or deny nothing, it cannot be doubted, that the contract of bottomry is one, over which the admiralty exercises an undisputed jurisdiction. It is indeed, the only tribunal capable of enforcing a specific performance *in rem* by seizing into its custody the very subject of hypothecation. To its guardian care, I may without rashness affirm, the whole commercial world look for security and redress, and without its summary interference, maritime loans would, in all probability, become obsolete. A jurisdiction so ancient and beneficial, which exercises its powers according to the law of nations, and those rules and maxims of civil right, which may be said to form the basis of the institutions of all Europe, ought not to be restrained within narrow bounds, unless authority or public policy distinctly requires it.

It is argued, that the courts of a country cannot, consistently with the law of nations, take cognizance of any controversy between foreigners, who are not domiciled within its territory; and *Vattel*^a is cited in support of the position. It is true, that *Vattel* contends that personal contro-

^a Book 2, ch. 7, s. 84, s. 85.—Ch. 8, s. 103.

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quies between foreigners, or between a foreigner and a citizen, are to be determined by the Judge of the place, where the defendant has his settled abode, or where he is, when any sudden difficulty arises. But this rule is so far from being universally acknowledged, that many nations exercise jurisdiction over the property and persons of foreigners found transiently in their territory, not only in favour of citizens, but also of other foreigners.¹ The rule seems indeed exclusively drawn from the civil law.

But, however the case may be, as to remitting the defendant to his domestic forum in personal controversies, it is very clearly settled, that in proceedings *in rem*, or the real actions of civil law, the proper forum is the *locus rei sitæ*. Indeed, it seems to have been a question among civilians, whether the action *in rem* could be brought before any other tribunal.²

With reference, therefore, to what may be deemed the public law of Europe, a proceeding *in rem* may well be maintained in our courts, where the property of a foreigner is within our jurisdiction. Nor am I able to perceive how the exercise of such judicial authority clashes with any principles of public policy. The refusal might indeed well be deemed a disregard of national comity, in as much as it would be withholding from a party the only effectual means of obtaining his right. And, accordingly, it has been held, that it is a good cause of reprisal for a sovereign not to compel his courts to execute the sentence of a foreign court, where the person or goods sentenced are within his jurisdiction.³

¹ *Plinius Comm. Inst. de Actionibus*, lib. 4, tit. 6, p. 777, s. 8, 9. — *2 Hub. lib. 5, tit. 1, § 46.* — *De Carrière vs. De Calonne*, 4 *Ves. Jr.* 577.

² *Fin. Comm. Inst. lib. 4, tit. 6, de Actionibus*, p. 777. — *2 Hub. lib. 5, tit. 1, § 50*, p. 728. — *Hetnec. ad Pandect. lib. 5, tit. 1, § 36.* — *Bynk. de foro Leg. ch. 4.* — *Casac. Disc. 43, § 53.* — *Id. Disc. 179, § 52.* — *2 Emer. Des contrats a la grosse, ch. 9, § 2, p. 523, § 4.*

³ *2 Bro. Adm.* 120.

It is argued, that the exercise of such authority would be highly inconvenient, in as much as this contract, like many other maritime contracts, is differently regulated in different countries, and therefore the construction of the contract, as well as the remedy on it, might in many cases essentially differ. And it is urged, that on this ground courts of law uniformly refuse to interfere, in respect to the contracts of foreigners made with their own seamen for marine services. I am not aware, that the inconvenience is so great as has been represented. It is a general rule, that foreign contracts are to be construed according to the law of the place where they are made, or to be executed. And I do not perceive the hardship of compelling a party to perform his engagements according to the construction, which the courts of his own country would put upon them. In respect to maritime contracts, there is still less reason to decline the jurisdiction, for in almost all civilized countries, these are in general substantially governed by the same rules. Almost all Europe have derived their maritime codes from the Mediterranean; and even in this country we take a pride in conforming our decisions to the rules of the venerable *Consolato del Mare*.

As to the case alluded to, of the contracts of seamen for wages, I am not aware that any authority countenances the position, in the extent in which it is laid down. Where the voyage has not terminated, or the seamen have bound themselves to abide by the decisions of the tribunals of their own country, foreign courts have declined any interference, and remitted the parties to their own tribunals for redress. But where the contract has been dissolved by the regular termination of the voyage, or by the wrongful act of the other party, the cases are not unfrequent, in which foreign courts have sustained the claim for mariners' wages.¹⁰ And

¹⁰ *Lisland vs. Stephens*, 3 Esp. R. 269.—*Hulle vs. Hightman*, 4 Esp. R. 75.—*S. C.* 2 East. R. 145.—*Sigard vs. Roberts*, 3 Esp. R. 71.

although the doctrine in *Gienar vs. Meyer*,¹¹ and the intimations in the *Two Friends*¹² look the other way, it does not seem to me that they outweigh the authorities on the other side, even supposing (which is not admitted) that they are not to be reconciled.

It is admitted, that suits for salvage have been entertained between foreigners in the admiralty, and it is urged that these form exceptions to the general rule, as cases standing upon the *jus gentium*, or upheld by the consent of the parties. Independent, however, of the principle, that consent can never give a jurisdiction to a court, which it cannot otherwise sustain, the decisions on this subject evidently proceed upon the ground, that the court has a competent capacity, and leave the policy of its exercise to be judged of by the circumstances of the particular case.¹³ And although Sir *W. Scott* intimated, in the *Two Friends*, that if there was the slightest disinclination of the parties to submit to the jurisdiction, he should not incline to interfere; yet he evidently refers to cases, where all the foreign parties decline the jurisdiction (as might happen in cases like that before him,) and not to cases, where the jurisdiction was sought by one of them. And the whole current of his reasoning strongly leans in favour of the policy of sustaining the general jurisdiction of the admiralty over foreigners.

In the same case, it was asserted by counsel and not denied, that the admiralty frequently entertained bottomry suits between foreigners. And, accordingly, we find that in the *Gratitudine*,¹⁴ and the *Jacob*,¹⁵ both of which cases

The Catharina, 1 *Peters*, R. 104.—*The Forsøket*, 1 *Peters*, R. 197.—*Moran vs. Boutin*, 1 *Peters*, R. 415.—*The St. Oloff*, 2 *Peters*, R. 428.—*The Nanny*, *Bee's Rep.* 217.

¹¹ 2 *H. Bl.* 603.

¹² 1 *Rob.* 271.

¹³ *The Two Friends*, 1 *Rob.* 271.—*Mason vs. Ship Blaireau*, 2 *Cranch*, 240.

¹⁴ 3 *Rob.* 240.

¹⁵ 4 *Rob.* 245.

were contested on other points with great ability, the court sustained the jurisdiction and decreed in favour of the bottomry holders. It may be said that the question of jurisdiction passed without objection; but it is difficult to conceive, that it could have escaped the attention of the court and of the bar, if it had been deemed tenable. It has been argued, that these were cases where the voyage ended within the British dominions, and therefore are distinguishable. But I know of no principle, which sustains this distinction. It was not the case of a contract made with reference to the laws, and to be executed within the dominions, of *Great Britain*. The most that can be said is, that there the lien first attached absolutely upon the property. In the latter case, however, this lien grew out of a former voyage, and was applied to reach proceeds of freight, which accrued in a subsequent voyage. The ground then of the jurisdiction could not have been, that the voyage terminated in *Great Britain*, but that the proceeds were within the reach of the court.

And this leads me to the consideration, that the jurisdiction of the admiralty, in matters of contract, depends not on the character of the parties, but on the character of the contract, whether maritime or not. When once its jurisdiction, therefore, rightfully attaches on the subject matter, it will exercise it conformably with the law of nations, or the *lex loci contractus*, as the case may require. It will enforce a foreign maritime judgment between foreigners, where either the property or the person is within its jurisdiction.¹⁶ Yet the objection to such proceedings, so far as touches the remedy, applies as forcibly here as in other maritime causes.

It has been urged, that whatever may be the propriety of interfering in cases arising between the subjects of the powers of Europe, the court ought studiously to abstain where the parties are subjects of the *Sublime Ottoman Porte*.

¹⁶ 2 Bro. Ad. 120.

Journals.

It is certainly true, that in prize causes an indulgence is granted to the subjects of the Ottoman empire, which is not allowed to any foreigners of Christian Europe, in consideration of the peculiarities of their situation and character, and of their not being professors of exactly the same law of nations with ourselves.¹⁷ But in matters of contract between such persons, or between them and other foreigners, I am not aware that courts have thought themselves at liberty to act otherwise, than by the general rules applicable to all forensic business; especially where one subject of the empire has asked for redress against another, and upon a maritime contract, the stipulations of which seem to require a summary interference, and to recognize an acquaintance with the general maritime codes of Europe.

On the whole, I am of opinion, that the rule of the civil law, in *actionibus in rem speciale forum tribuit. locus in quo res sita est*,¹⁸ applies to this case; that there is no solid ground against the exercise of the jurisdiction, and in the language of Sir W. Scott, on another occasion,¹⁹ I will add, "I go farther, and say, that I think there is great reason for it, because it is the only way of enforcing the best security, that of the lien on the property itself."

I have thus far considered this case upon general principles; and if I had felt any difficulty in the conclusion, which I have already stated, I should have felt none, when the contract itself carries on its face a stipulation, that the voyage was to terminate in a foreign country; and therefore that a suit in rem in such a foreign country would not only be sustained (as the claimant's counsel has admitted) but was evi-

¹⁷ *The Madonna del Burro*, 4 Rob. R. 169.

¹⁸ *Vins. Comm. Inst. de Actionibus*, lib. A. tit. 8, pp. 777.—*Heinecc. Comm. in Pand.* pt. 2, § 36, p. 147.

¹⁹ *The Two Friends*, 1 Rob. R. 371, 389.

dently within the contemplation of the parties. Where the parties have, therefore, waived the benefit of the exclusive jurisdiction of their own tribunals, the whole reasoning, upon which they should be remitted to such forum, falls to the ground. To remit this cause from the present to another foreign forum, I imagine would be "but to change postures on an uneasy bed."

There is also another fact alleged, and which, if true, brings this case directly within the authorities cited, and that is, that the voyage really ended in the *United States*. The voyage stated in the bottomry bond is from *Smyrna* to the *West*; and a different rate of interest is payable, as the cargo shall be discharged in *Malta*, or *Sicily*, *Majorca*, *Minorca* or other port in *Spain*, or in *Lisbon*.— And the claimant expressly stipulates to make payment in *Smyrna*, on his safe return, or in any other places where the obligation should be presented to him, after the sale of the cargo then on board. And the allegation of the proponent states, that the cargo was wholly sold, part in the *United States*, and part at the *Havanna*. But I forbear to dwell on this and other peculiarities, because I am entirely satisfied to rest the cause on the soundness of the general doctrine. I overrule the protest of the claimant to the jurisdiction of the Court, and assign him to answer peremptorily to the libel of the plaintiff.²²

Prescott and Hubbard for the libellant.

G. Blake for the claimant.

At a subsequent day of the term, *Blake* read the answer in chief of *Catara*, which, among other things, denied

²². See the case of the *Ses Reuter*, 1 *Dobson's Ad. R.* 22.

that the instrument of hypothecation relied upon was his deed.

The replication averred the bond to be the deed of *Catara*.

A copy of the contract in the handwriting of the Swedish consul at *Smyrna*, and attested by him as a true copy, was produced by the counsel of the libellant, and upon this they founded a motion for a continuance, to afford them time for procuring the original.

Blake, District Attorney, opposed this motion. He represented to the Court the extreme hardship of this case, and contended, that there had been such remissness and laches in not procuring the original, that no postponement ought to be granted to the libellants for this cause; that three originals were executed, and probably delivered to the obligee; that one of these might have been sent at the same time with the copy; that it would be impossible to obtain the original from *Smyrna* in any reasonable time, and that the libellant had therefore commenced this action prematurely, and ought not be permitted to hold the claimant in fetters for so long a time, as must necessarily elapse.

STORY, J. said, he did not wish to hear the other side; that the principles of law were clear; that admitting three originals to have been executed, it would have been difficult, considering the nature of this voyage, for the libellant to obtain such intelligence, as would enable him to determine, to what place the originals should be sent; that the hardship was common to both parties; and that the Court could not be influenced by the distressed situation of *Catara*, however it might be deserving of pity; that, at common law, it was the practice to allow time for procuring originals, as in cases of bills of exchange; that there did not appear, in this case, to have been any laches on the part

of the libellant, and there being evidence to satisfy the Court of the existence of an original, the cause must therefore be continued. If, as was alleged, the vessel was in a perishing condition, an order of sale might be made, upon a proper application for this purpose.²

[² The following extract from Sir Leslie Jenkins's argument for the bill to ascertain the jurisdiction of the admiralty, (*Works*, vol. I. p. 82,) is not inapplicable to some of the subjects discussed in the foregoing case. "An English merchant here owes money upon a foreign contract to a Spaniard; he sues for it in the admiralty, but the English defendant flies to the common law, and has a prohibition.--- The Spaniard, in his trial at law, produces the contract in the form usual beyond sea. The defendant pleads *non est factum*; how can the party be relieved against this plea? For the original contract, subscribed by the contractors and the witnesses, is a record, that the Notary in Spain will not part with, without forswearing himself and losing his office. The copy exemplified will be no evidence to a jury, nor can the notary and the witnesses be had and heard *viva voce*, without a thousand contingencies; whereas the Spaniard exhibiting his instrument upon oath, for a true and real instrument, in the admiralty, the adversary must either confess or deny it; if he confess the instrument, (as notarial instruments seldom are denied) there is as much in proof before the court as to judge of the contents of it; if it be denied, the plaintiff may have a commission into Spain *pro scrutinio*, and the copies exhibited here may be inspected, and compared with the original remaining in the notary's hand. And the magistrates of the place will certify, that the notary is a public and authentic person there, to whose acts credit is given in judgment, and then that instrument is before the court in due form of proof."]

PRINCE IN ERROR vs. UNITED STATES.

The act of 2d Aug. 1813, ch. 48, releasing one-third of the duties accruing on goods captured and brought into the *United States* by any private armed vessel of the *United States*, did not apply to the case of a vessel captured and brought in before the passing of the act, but not condemned until after it had passed.

Duties accrue as soon as the goods are voluntarily imported, and this as well as to prize goods, as any other; for the condemnation relates back to the time of importation.

THIS was a writ of error to the District Court of *Massachusetts*, in an action of debt, brought by the *United States*

against the plaintiff in error, on a revenue bond for the duties payable on a certain prize cargo imported into the *United States*. It appeared from the pleadings, that the prize ship and cargo were captured by the private armed schooner *Favourite* on the 20th of June, 1813, and arrived in the port of *Plymouth*, where the entry was made, on the 21st day of July of the same year. A prize allegation was filed on the 10th day of the ensuing August, and the vessel and cargo finally condemned in the District Court on the 5th of the succeeding month.

By the act of Congress of 2d of August, 1813, ch. 48, it is provided, that on all goods, &c. captured from the enemy, and made good and lawful prize of war, by any private armed commissioned ship of the *United States*, and brought into the *United States* or their territories, there shall be allowed a deduction of 33 1-3 per cent. on the amount of duties then imposed by law.

The plea, after oyer of the bond and condition, and setting forth the facts above stated, averred, that the defendant, now plaintiff in error, had tendered the amount of duties, deducting one third.

Prescott and *J. T. Austin*, for the plaintiff in error.
1. Did the statute apply immediately to all goods then within the country, or only to those which should arrive after its passage?

The statute is to receive a liberal construction. The Court will look at the mischief intended to be remedied, and if possible understand the language of the law in a sense sufficiently broad to meet that mischief. Now the evil complained of was, that the duties were so high, as to discourage privateers, and it was, therefore, thought useful to remit in their favour a part of those duties. This evil was not less felt by those, who were then

proceeding in the courts of the *United States* against prizes before made, than by those who were afterwards to seize and bring them in; nor can any reason be given, consistent with the liberal intentions of Congress, why the same indulgence should not be extended to the one as to the other.

The language of the act extends to all cases, where the duties had not actually been paid. There is nothing in the words themselves to shew an intended future operation, and it is as reasonable to supply words, to give a retrospective, as a prospective effect. "All goods, &c. captured," must comprehend all those, which had been captured at any time before. The next clause alone indicates something future, and must mean, "which shall be adjudged good and lawful prize." The Court will adopt a different construction, when the duties are to be reduced for the benefit of a class of men engaged in a hazardous service, which is supposed to be useful to the public, from what they would, if the duties were to be increased.

2. The right to duties accrues on the arrival of the goods at a port of entry; but goods brought in by the *vis major* are not "imported" in the legal sense of the word. In such case, no right to duties accrues, until an election is made to enter. Until that time, they are not imported.

When goods are brought in by one of our own cruisers, for inquiry and adjudication, the interest remains contingent until such adjudication. They may not be subject to condemnation. By the misconduct of the captors they may become the property of the *United States*. A claimant may appear, who destined them for some other country. Can any right to duties accrue, while the interest is thus suspended? Consider what inconveniences would follow. The Collector, twenty-four hours after the arrival of a prize, calls upon the captor and compels him to give bond

for the duties. Four months afterwards the goods are restored to a neutral claimant, who prefers carrying them to his own country to selling them here. In the meanwhile, the captor must pay his bond, without knowing whether the goods will be condemned or not. But, if the duties are to be secured, who is to give the bond? The captors have not the custody, and it would be unreasonable to require of the Marshal, who alone can have the custody, to become personally bound for the payment of duties.

If, on the other hand, the goods are held in the custody of law until a condemnation, and no duties are paid or secured until it is ascertained by a judicial decree, that they are not the property of neutrals, and they are then entered by the captors and the duties secured, the rights of all parties are preserved, and all inconvenience is avoided.

If this be, as it is believed to be, the reasonable construction of the statutes, then the captors ought not to suffer in this case in consequence of their having given bond before the duties had accrued. All the rights and advantages should be saved to them, which they would have had, if the duties had not been secured until after condemnation, which was subsequent to the passage of the act.

Blake, District Attorney, for the *United States*. By the act imposing duties on goods imported,¹ the duties accrue on arrival, in whose hands soever they may be, by whomever owned, and under whatever circumstances they may be brought in. This statute is not controlled by the provisions of the law, afterwards passed, regulating the mode of collection. If no one appears to enter the goods and secure the duties within fifteen days, they are then taken into custody, and in due time, no one appearing, they may be sold, to pay the duties.

¹ *U. S. L.* 48.

The only question then is, whether any part of the duties is released by the act of August 2d? But this act cannot affect the duties payable upon goods, which had arrived before it passed. These must depend upon the law existing at the time of arrival. Nor was this act intended to relate to goods then in the country. From its language it is obvious, that the legislature meant to provide only for future captures.

STORY, J. The question for the decision of the Court is, whether the prize cargo, in this case, is entitled to the benefit of the act for reducing the duties on prize goods, the same having been imported before, but not proceeded against, or condemned, until after the passage of the same act.

It is argued by the plaintiff in error, that the statute applies to all cases, where the duties had not become actually due, and had not been paid, before the time of its passage, or at least, to all cases, where the duties had not already accrued; that in prize cases, no title vests in the captors until condemnation, and, therefore, no right to duties can attach until such adjudication.

By the general principles of law, duties accrue upon the voluntary importation of goods into the ports of a country, and the statutes of the *United States*, imposing duties, affirm these principles.^a The prize act of 26th of June, 1812, ch. 107, sec. 14, (which was not cited at the argument,) declares that prize goods, when imported into the *United States*, shall pay the like duties, as goods imported in the ordinary course of trade are or may at the time, (meaning, of importation) be liable to pay. Both cases then are to be governed by the same principles.

^a Act 10th Aug. 1790, ch. 39.—*U. States vs. Howell*, 5 Cranch, 368.

It is true, that until condemnation it cannot be ascertained that the capture was lawful, or the goods rightfully imported. The prize may be a neutral, and decreed to be restored by the Court, and in such case no duties would attach, unless the cargo were afterwards voluntarily unladen, and an election made by the neutral to consider the *United States*, as the port of discharge.³ Still, though the transaction takes its character from the final adjudication, yet when once that character is ascertained, it relates back to the original importation. If, therefore, condemnation passes upon the property, the duties, by relation, attach from the time of importation, and are payable accordingly.

Such, then, would have been the legal result, if the act of the 2d of August, 1813, ch. 48, had never been passed. Does that act extend to cases, where, by relation, the title to the full duties had already accrued? It is a general rule, that statutes are to be construed to operate in *futuro*, unless from the language a retrospective effect be clearly intended. "*Nova constitutio futuris formam imponere debet, et non preteritis.*"⁴ And this maxim applies as well to remedial, as to other statutes. There is nothing in the wording of this act, which points to a retrospective operation, and the whole intent may be satisfied by restraining it to future cases. On the other hand, if a retrospective effect is to be given to this act, the provision must equally apply to all cases of capture made since the war, whether the duties have been paid or not. The words must either read, "on all goods, &c. which *have been* captured from the enemy, and which *have been* made good and lawful prize of war, &c. and *have been* brought into the *United States*," or, "on all goods, &c. which *shall be* captured from the enemy, and *shall be* made good and lawful prize of war, &c.

³ See the *Concord*, 9 Cranch, 387.

⁴ *Bract. lib. 4, fol. 228, 2 Inst. 292.*

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and *shall be brought into the United States, &c.*"—Independent of the objection to the former construction, which I have already stated, it is decisive against it, that the manifest object of the legislature would be defeated, for the act would have spent its whole force on past cases, and could not operate in *futuro*.

On the whole, I am of opinion, that the prize goods, in this case, are not entitled to the 33 1-3 per cent. deduction, and the judgment of the District Court is affirmed.⁵

[⁵ As to the time when, and the cases in which, duties accrue, see *Hale on the Customs—Harg. Law Tracts*, 213, 214—224.]

THE SAUNDERS, LEWIS AND CO. CLAIMANTS.

Under the second section of the act, 2 Aug. 1813, ch. 56, a prize allegation cannot be sustained for using a British license, unless the vessel be seized in *delicto*, during the voyage. If the voyage be entirely ended, the offence is purged.

Quere.—How it would be on an information on the first section of the same act.

THIS was an information in the nature of a prize allegation, founded on the second section of the act of August 2d, 1813, ch. 56. The allegation in substance charged, that the said brigantine *Saunders*, was, at the port of *Greenock* in *Scotland*, employed in an illegal intercourse with the enemies of the *United States*, in the month of November, 1813; and in the same month, proceeded from said *Greenock*, with a full cargo on board, purchased and received from enemies of the *United States*, under the protection of a license from the government of *Great Britain*, to the port of *Corunna* in *Spain*, where the said cargo was sold and disposed of; and afterwards, under the protection of the same license, departed in ballast from *Corunna* for the *United States*, and arrived at *New Bedford*, on the 10th

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of March, 1814; and, on the 5th day of the ensuing April, was seized at said port by the collector of the customs.

The claim, and accompanying affidavit, which were admitted to contain all the material facts, asserted in substance, that on the 10th day of October, 1812, the brig sailed from the *Capes of the Delaware* with a cargo of flour owned partly by the claimants, and partly by Spanish subjects, bound for *Teneriffe*, and from thence to *Philadelphia*, having on board, for her protection during the voyage, a *British* license, countersigned and vouched by *Don Onis*, the unaccredited minister of *Spain*; that on the 17th of November following, she was captured by the British letter of marque, the *Monarch*, and ordered for *Greenock*, but, during the voyage, was by stress of weather compelled to go into *Madeira*, where a part of the cargo was taken out, and with the residue, the captors proceeded in the brig to *Greenock*; that after her arrival at *Greenock*, the brig was libelled as prize, and pending the prize proceedings, the cargo was sold as perishable by order of the admiralty; that the brig was detained until the 6th of August, 1813, when restitution thereof, and of the cargo, were decreed on payment of the costs of the captors; that by various accidents the brig was detained at *Greenock* until the 25th of November following, when she sailed for *Philadelphia* in ballast; that, in the course of the voyage, she was compelled by stress of weather to put into *Corunna* for repairs; and after refitting, she sailed from that port, and arrived at *New Bedford* on the 12th of March, 1814, without having touched at any other ports during the voyage; that at the last port the voyage was terminated, the crew were discharged, and the brig hauled up, and all her papers and documents delivered to the owners or their agents; and afterwards, and not before, the seizure was made by the collector.

Blake, District Attorney. There are two grounds of forfeiture—1, An offence committed, to which the forfeiture is annexed as a penalty. 2, The using of a British license, by which the vessel lost her American character, and became *quasi enemy's* property.

The objection, that the vessel was not liable to seizure after the completion of her voyage, involves the absurdity, that her being forfeited or not depended upon mere chance or fortune. Upon this principle, a vessel, which would have been good prize, if taken on the high seas, will, if so successful as to run the gauntlet and get safe into port, be secure from seizure and forfeiture. Admitting even that in the hands of an innocent vendee, the vessel might be protected, yet that is not the present case; for she remained, until the time of the seizure, the property of the same persons, who owned her on the voyage. By the act of the 2d of August, 1813, ch. 56, sect. 2,¹ all vessels using an enemy's license are made good prize of war. As it is not denied that the *Saunders* sailed under the protection of an enemy's license, it is difficult to discover any reason for her being exempt from forfeiture; especially, when the rights of no innocent persons will be affected. The license, it is true, was not on board at the time of the seizure, but, being permanent, it must be considered as still in the use of the vessel. It was in the possession of the master or owner, and was as much a document belonging to the vessel, as her American register.²

W. Sullivan, for the claimants. The license is plainly limited to a single voyage, and at the time of the seizure, had lost all its effect, so that the vessel could not again have sailed under its protection.

¹ 12 U. S. L. 225.

² The Reporter was absent during a part of *Blake's* argument.

If the vessel is subject to condemnation, it must be either an enemy's property, or for having traded with the enemy.

This, being a prize allegation, must be governed by the ordinary rules of prize proceedings. Now no rule is better established, than that the papers and the evidence of persons on board are to be first examined. But in this case all the papers were lodged at the customhouse, and if produced, they would prove the vessel to be American property. No papers have been offered by the libellant, and no examination of persons, except of one man, which was taken seventy-eight days after the ship's arrival. This evidence is not admissible, and there then remains no evidence, upon which the process can be maintained.

There is no doubt that the vessel was American when she sailed, being documented and cleared as such. She is not then enemy's property, unless by reason of some act identifying her with the enemy. It is not denied, that by the general law, this vessel would have been subject to capture and condemnation as prize, if found on the high seas with a license of this description. But a distinction is to be made between the moral agent, who commits the offence, and the instrument, with which it is committed. The person is liable to punishment at any distance of time, but the thing must be seized *flagrante delicto*, in the very act of committing the offence. No instance, it is believed, can be found of a seizure as prize after the complete termination of the enterprise. The confiscations, or condemnations for intercourse with prohibited ports, &c. under the restrictive system, were by statute. It being expressly provided, that certain penalties should follow certain acts, if the acts were done, the liability was incurred, and the forfeiture might be exacted at any distance of time. But it is not so with the act, on which this process is founded. It merely declares, that under certain circumstances, a ves-

sel shall be deemed an enemy's vessel and be treated as such. In addition to this, no authority to seize, even when all the circumstances exist, is given to the collector.

STORY, J. (after reciting the facts.) Upon these facts, the question presented for the decision of the Court is, whether, under the second section of the act of the 2d of August, 1813, ch. 56, the said brig is liable to seizure and condemnation, for having had and used a British license on a voyage, which was, at the time of the seizure, completely terminated.

This section provides, that any ship of the *United States*, sailing under, or found on the high seas, using a British license, shall be considered and held, as sailing under the flag of the government of *Great Britain*, and may be seized on the high seas or elsewhere, by the public or private armed ships of the *United States*, and upon due proof thereof be, together with her cargo, condemned to the use of the captors, and the proceeds distributed according to the rules prescribed in cases of prizes made from the enemy. This section must now be taken to have been made merely in affirmance of the general law of prize; and, in its terms, it is confined to captures made by commissioned ships, during the existence of the illegal voyage. It is the actual use of the license, at the time of the seizure, and not the former use in a previous voyage, which authorizes the search and capture. The authority to seize, also, is given only to commissioned ships, and is not extended to the mere civil officers of the government. Upon the express provisions of this section, therefore, the case cannot be sustained. It must stand, if at all, upon the general law of prize, and the right of the *United States* to enforce the prerogatives of war against all, who shall offend against them, and, in a more especial manner, the execution of their

own laws against their own citizens. Admitting then, what indeed cannot be denied, that the sailing under a British license subjects a vessel of the *United States* to be deemed as sailing under the enemy's flag, it remains to be considered, whether the forfeiture continues to attach, although the hostile character so acquired be completely gone.

In cases of breaches of blockades, and of contraband of war, the doctrine seems to be established, that the vessel must be captured *in delicto*; otherwise the offence is purged.³ If, therefore, the port of destination have become neutral, or the blockade have been raised, before the capture, the *corpus delicti* is deemed to be extinguished. The same principle has been applied, where the intention was to trade with the enemy; if, at the time of carrying the design into effect, the person is no longer an enemy, or the port no longer hostile, the offence is not committed; for there must be both intention and act.⁴

It strikes me, that the present case must be decided upon analogous principles. No case has been adduced, in which the penalty has been inflicted for an illegal traffic with the enemy, upon the mere footing of the prize law, unless where the vessel has been captured during her delinquency. The very silence of the books, in such a case, furnishes some argument against the existence of a rule, which should attach an indissoluble taint. The reasonable principle, to be extracted from the authorities, would seem to be, that so long as you retain the hostile character by your illegal conduct, either in contraband trade, in violation of blockade, or in hostile intercourse, you shall be subject to all the penalties of such character. But when, without fraud, you have resumed your real national character, it purges away all the noxious qualities, which previously infected it.

³ *The Imine*, 3 Rob. 167.—*The Lisette*, 6 Rob. 337.

⁴ *The Abbey*, 5 Rob. 251.

In the case before the Court, it is clear, that, during the voyage, the vessel might have been seized and condemned, as an enemy's vessel, sailing under an enemy's flag. But, at the time of her seizure, her American character had re-attached. She was no longer engaged in hostile traffic, or sailing under an enemy's license, or using an enemy's protection. In no respect was she, then, to be deemed an enemy's vessel. I hold, therefore, that not having been taken *in delicto*, the prize law would not adjudge her good and lawful prize.

I give no opinion how the law would be in a case founded on the first section of the act of the 2d of August, 1813, ch. 56. There may be a material distinction, founded on the language of that section. The forfeiture there imposed is absolute, without reference to the time of seizure. Nor do I give any opinion as to a case, where, by fraudulent suppression or false destination, the forfeiture could not be inflicted on the original voyage, and, under such circumstances, it sought to be enforced on a capture in a subsequent voyage.⁵

⁵ See the *Christiansberg*, 6 Rob. 376.

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Of the nature and effect of a decree in a Court of Probate, and as to the parties whom it binds.

Of an appeal to the Supreme Court, and the effect of a remitter of the cause.

If a decree of the Supreme Court of Probate reverse that of the inferior Court decreeing distribution, such reversal is no bar to a subsequent suit by the parties claiming as heirs or legal representatives. *A fortiori*, it is no bar to a bill in equity.

THIS was a bill in equity, in which the complainant sought from the defendant, who was administrator with the will

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annexed, of *James Murray* alias *Mowry*, a discovery and distribution of the undivided estate of the testator, of whom she asserted herself to be heir at law.

The defendant pleaded in bar, that before the exhibition of the bill, *viz.* on the 31st day of August, A. D. 1807, he filed before the Judge of Probate of the county of *Suffolk*, in this district, a copy of the will of *James Murray*, late of *Calcutta*, in the province of *Bengal*, deceased, and of the probate thereof, and, in due course of law, procured letters of administration, with the will of said *Murray* annexed, and afterwards, as administrator, possessed himself of sundry sums of money, being the personal estate of said *James Murray* within the Commonwealth of *Massachusetts*; that afterwards, on the 30th day of November, 1812, the complainant, and one *John Mowry*, representing themselves to be the brother and sister, and heirs at law, of said deceased, preferred their petition to said Judge, praying him to order a distribution to them of the property of said deceased not bequeathed by him; that on the 15th of February, 1813, at a Probate Court held at *Boston*, he, the defendant, presented for allowance his account as administrator, and the said complainant, and *John Mowry*, then prayed a decree of distribution to and among them, as heirs at law; that the defendant then and there denied, that they were next of kin, and, also, that if they were next of kin, they were entitled to distribution; that the said Judge allowed the administrator's account, and decreed distribution of the balance, as prayed for; that on the 16th day of February, he, the defendant, appealed from said decree to the Supreme Court of Probate, next to be held at *Boston*, and suggested the following reasons of appeal, *viz.* :—

1st. "That the said *John Mowry* and *Mary Harvey*, who claim as brother and sister of the said *James Murray*

deceased, are not his next of kin, because, as this appellant humbly apprehends, the said *James Murray* was not born in lawful wedlock, and, therefore, could not have any lawful heirs, but such as should be his lineal descendants.

2d. "That this Court has not power and authority to distribute the undivided surplus of the said *James Murray's* estate among his next of kin; but that all the goods and chattels collected in this Commonwealth by the said administrator, after paying thereout the debts due in this Commonwealth and the charges of administration, ought to be transmitted to the executors of the last will and testament of the said *James Murray*, in *Bengal*, to be there accounted for, appropriated, and distributed, according to the will of said deceased, and the laws in force in *Bengal*.

3d. "That if the said petitioners are next of kin of the said deceased, and, as such, entitled to the residue of his goods and estate, they can only claim the residue thereof, after the payment of all debts and legacies, and charges of administering his goods and estate, both in *Bengal* and in this Commonwealth; and the said petitioners ought, therefore, to make it appear, that the said executor's account has been settled and allowed by the tribunal, having jurisdiction in the case at *Bengal*, and that nothing is now due, in that country, for debts and legacies, and charges of administration there; or to shew, otherwise, that the executors have a sufficient sum, in that country, to pay all such debts, legacies and charges; but no such evidence has been offered.

4th. "That the goods and estate of said deceased, which have come to the hands of his said executors, in *Bengal*, are not, as this appellant doth aver and verily believe, sufficient to pay the legacies given in and by said will, and the charges of administering his said estate in *Bengal*, but that they are insufficient for this purpose by

the sum of fourteen thousand dollars and upwards, exclusive of interest.

5th. "That the residue of said deceased's estate ought to be paid over and distributed according to the laws in force in *Bengal*; and it doth not appear, whether, by those laws, the said residue would be paid over to the next of kin of said deceased, or be retained by the said executors to their own use, or appropriated and distributed in any other manner; and no evidence was offered on that point, and the said appellant doth suggest and aver, that, by the said laws in force in *Bengal*, all the said residue ought to be retained by the said executors to their own use."

The defendant farther averred, that he prosecuted his appeal, and that, at the Supreme Court of Probate, held on the second Tuesday of March, A. D. 1814, it was decreed, that the said decree of distribution to the said *John Mowry* and the complainant was wrong and erroneous, and that the same be reversed; and the said Supreme Court of Probate, then and there, farther ordered the said cause to be remitted to the said Judge of Probate, that he might proceed therein, as to law and justice should appertain; and that the claim of the said *Mowry* and the complainant, in said Court of Probate, to be admitted as the next of kin of said *Murray* deceased, and, as such, to be entitled to distribution, was the same identical claim now made in the complainant's bill, in which she represents herself as the only next of kin of said deceased.

The defendant farther averred, that the said *Mowry* and the complainant became parties, of their own accord, to the proceeding in said Probate Court, and that the said Court of Probate, and the said Supreme Court of Probate, were Courts of competent jurisdiction to determine, whether the said *Mowry*, and the complainant, were heirs at law of said deceased, and, as such, entitled to the distribution of his estate.

To this plea there was a demurrer and joinder in demurrer.

Selfridge, for the complainant. This Court has concurrent jurisdiction with the Courts of Probate, in all cases of intestacy and legacies, if the complainant be an alien or citizen of another state. This is not denied by the defendant; but it is alleged, that the matter, for which relief is now sought, has already been decided by a competent tribunal. No sentence, even of a court of competent jurisdiction, is conclusive upon other courts having concurrent jurisdiction, unless the matter was directly the subject of adjudication. In this case, the defendant's answer merely shews, that a decree of the Court of Probate was reversed on appeal, and that the cause was remitted for farther proceedings. No fact whatever is decided by the decree. The cause must, therefore, be considered as still open to investigation.¹

Hubbard, for the defendant. Does the decree of the Supreme Court conclude the complainant as to the merits of her claim? Or does it merely relieve the case from the decree of the Judge of Probate, and thus leave it where it would have been, if no decree had been made in either court?

The reversal was of a decree of the Judge of Probate ordering distribution. If the effect of such reversal were merely to open the cause, and restore it to the same state as before any decree, it would be competent for the Judge of Probate to proceed, and again order distribution. The appeal would thus be nugatory, and the administrator would

¹ *Robin's case*, 2 Wils. R. 118.—*Dutchess of Kingston's case*, 11 State Tri. 280.—*Cross vs. Salter*, 3 Term R. 639.—*Boston vs. Boylston*, 4 Mass. R. 325.

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be bound by his bond to pay over to such person, as the Judge of Probate should appoint.² And its being a will of foreign probate would not alter the case.

If the Judge of Probate has now no power to decree distribution, then the decree of reversal has all the effect, for which the defendant contends, *viz. that the present petitioner is not entitled to a distributive share.* The simple reversal of the Judge's decree was, therefore, all that was required to give full operation to the sentence of the Supreme Court.

But, admitting that, by the reversal, the parties are, in all respects, restored to their former situation, is this Court now competent to decide on their rights, when, by so doing, they oust of its jurisdiction a court, before which the cause is regularly pending? The effect of a re-opening of the cause can be no other, than to authorize the Court of Probate to go on and decide, in the same manner as if nothing had been done. It would follow, that the complainant is still a party to the proceedings in that Court, and the pendency of those proceedings is a good plea in bar to the proceedings here.³

The complainant, having elected her remedy in a court of the state, cannot now abandon it, and compel the administrator to answer in a court of the *United States*. At any rate, she should have removed her cause before a trial in the Probate Court.

But it is contended, that the decree of the Supreme Court is conclusive upon the complainant, as to her claim here. That decree must have proceeded upon some of the reasons of appeal, or upon all of them together. It decided, that the complainant and *John Mowry* were not next of

² 1 *Mass. L.* 128, 246.—*Prov. Laws*, 230, 1 *Salk.* 262, *Parker vs. Harris*.

³ 3 *Atk.* 627, *Gregory vs. Molesworth*.

kin, or, if next of kin, that they were not entitled to distribution. This, it is true, might have been either because they did not shew, that there were no debts or legacies to be paid in *Calcutta*, or because they were not entitled by the laws of *Bengal*, or because the jurisdiction belonged to some foreign court. But, of these causes, it is only that of debts and legacies to be paid, which can be considered as dilatory. And when one of the reasons is, that the parties are not next of kin, and, the decree being general, no specification is requested by the parties, it must be presumed to have been founded on such of the reasons as are permanent and conclusive, or else on all of them taken together. The effect, therefore, is the same, as if the reason had been asked, and it had been stated to be, that the parties were not next of kin.⁴

A court of competent jurisdiction having decided a fact directly put in issue before it, the party is estopped from trying that fact again.⁵ Now, in this case, the same allegations are made, and the same facts will be in issue, in this Court, as in the Court of Probate. The maxim of law is "*nemo debet bis vexari, si constet curiæ quod sit pro una et eadem causa.*" It is said,⁶ that chancery shall not relieve against a maxim of law upon a matter of equity,

⁴ 2 Roll. Abr. 219, Eccl. Ley. Pl. 2.

⁵ 8 Rep. Pref. 27.—Cro. Elix. 668.—5 Rep. 61, *Sperry's case*.—3 Wils. 304, *Kitchen vs. Campbell*.—2 Bl. 830.—Pollexf. 634, *Putt & al. vs. Ramsters*.—6 T. R. 607, *Seddon vs. Tutop*.—7 T. R. 269, *Marriot vs. Hampton*.—3 East R. 346, *Outram vs. Morewood*.—Fitz. Ab. Estop. pl. 20.—4 Rep. 29, *Bunting vs. Lepingwell*.—2 Vent. 44.—7 Rep. 42 b. *Kenn's case*.—5 Rep. 7 a.—Carth. 225, *Jones vs. Bow*.—2 Str. 961, *De Costa vs. Villa Real*.—2 Str. 733, *Burrows vs. Jemine*.—1 Str. 703, *Rex vs. Rhodes*.—481 *Rex vs. Vincent*.—1 Salt. 290, *Blackman's case*.—Hardw. Cas. 11, *Chus vs. Bathurst*.—1 Lev. 235, *Noel vs. Wells*.—8 Mod. 155, *Collins vs. Jessol*.—2 Lev. 15, *Rex vs. New College in Oxford*.—Amb. 791, *Meadows vs. Dutches of Kingston*.—6 Mass. R. 286, *Baxter & al. vs. N. E. Ins. Co.*

⁶ 4 Vin. 391. Chancery R.

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by which the maxim shall be crossed, for this is to make a new law.

[*STORY, J.* Have you any case, in which a judgment of a court of competent jurisdiction having been reversed, the party is precluded from a new action?]

The reversal is conclusive as to the error, for which the judgment is reversed. If it be for mere form, the party is not concluded upon the merits. But, there is a difference between this case and cases at common law, in which a new suit may be brought after reversal. This is a proceeding *in rem*; a party comes in and claims to be entitled. On appeal to another court, it is decided that his claim is not good, and the cause is sent back for the administrator to proceed, as he would have done, if no such interference had taken place. The effect is only to discharge the cause of the difficulty arising from this claim, leaving the other proceedings in full force. Otherwise, it would be necessary to pursue, *de novo*, all the steps of the administration.

Otis, on the same side. The question presented by the complainant's bill has already been decided by a court of competent jurisdiction, and one of her own election. The principles both of law and equity, therefore, forbid its being again revived. The jurisdiction of matters relating to estates and wills belongs, originally, to the Probate Court, and no court, with similar powers, or for similar purposes, has yet been instituted by the *United States*. The Probate Court must, at least, have the exclusive cognizance, so far as to settle the administration account, and to determine what sum remains to be distributed. It was optional with the complainant to make her claim before that Court, or to omit it, and, if the doctrine contended for on the other side be true, she might have proceeded origi-

nally here. She has made her election, and obtained a decree, from which the respondent appealed for reasons, any one of which, is conclusive. Upon these reasons the Supreme Court has decided, and the question is, what effect is to be given to its decree? To ascertain whether it be conclusive, it is only necessary to consider, what the Judge of Probate could have done after the reversal. If the reversal was founded upon some only of the reasons of appeal, then, as to the others, it was competent for him to proceed anew. But could he, afterwards, upon application of the parties, try the fact of *James Murray's* legitimacy? Certainly he could not. He must consider the question as settled by the Court, to which the cause was carried by appeal. But, even if the decree were not conclusive upon him, the cause would be still in the Probate Court, where the complainant has elected to proceed. This election she ought not now to be permitted to waive, for the purpose of convening the administrator before another court. Had the Supreme Court affirmed, instead of reversing, the decree of the Judge of Probate, the administrator would have been concluded. He could have had no remedy in a court of the *United States*. Having, then, been brought by the complainant into a situation, in which the judgment of the court was binding both upon him and the executor in *India*, it would be unjust, that, after a decree in his favour, he should be drawn from that tribunal to answer before another.

The Court will not, in this case, be anxious to extend its jurisdiction, to remedy even a defect of justice in another tribunal. For, though a citizen of another state may obtain relief in the Chancery Court, yet, to a citizen of *Massachusetts*, there will be no remedy, after an appeal to the Supreme Court of Probate. In addition to this inequality of remedy, where the rights are the same, numberless in-

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inconveniences must arise from the frequent clashing of the jurisdictions. It would also be in the power of any stranger to put a stop to the proceedings of the Probate Court, and the object of the law in permitting foreign executors to collect the debts and effects lying within our territory might be entirely defeated. This inconvenience is strongly exemplified in the present case. The complainant has arrested property, which was going to the executor in a foreign country. She has detained it here several years, and now that a decision has been pronounced against her, she comes into a court of chancery, to begin *de novo*, and still farther to embarrass the proceedings of the defendant and executor.

On writs of error it is not unusual for the court to go on and decide every question of law, in order to prevent future litigation. This has often been done in the Supreme Court of the *United States*. This Court will be governed by the same equitable maxims, and will, therefore, refuse to sustain the petition of a party, who has already elected to proceed in another jurisdiction.

Dexter, in reply. There is no reason to apprehend such clashing of jurisdiction, as has been suggested on the other side. But even if there were, it is a sufficient answer to the objection, that the constitution and laws have made it the duty of this Court to hear and decide the present complaint, as a part of its general jurisdiction, extending to all controversies between citizens of different states. However it might have been in a case, in which there were in one state many heirs, and but one in another, such is not the present case. Here there is but one complainant, who claims as sole heir.

It being then clear, as a general position, that the Court has jurisdiction, an attempt is made to shew, that its juris

diction cannot be exercised, because the plaintiff has made her election to proceed in a state court, and because the defendant appealed from a decree of the Judge of Probate to the Supreme Court of Probate, where a reversal was had, which it is contended must be conclusive as to all the reasons of appeal, in their nature final and not dilatory.

It will not be denied, that the complainant is concluded, if she has proceeded to a final judgment, definitively settling her rights ; but if there has been no such judgment, it cannot be pretended, that her election to proceed in a state court has taken away her right of resorting to a court of the *United States*.

[Upon this point, *Dexter* was stopped by the Court.]

It is next contended, that, as the law requires reasons of appeal, the judgment must be taken to be conclusive as to all the reasons assigned. But the reasons of appeal are merely formal. They resemble an assignment of errors. The court will permit other reasons to be argued, and, on writs of error, will reverse the judgment, if other errors than those assigned are apparent on the record. It never was pretended, that the party is limited to the errors assigned. No greater effect is given by the statute to the reasons of appeal.

But even if the court were restricted to the reasons of appeal, the consequences contended for would not follow. That sufficient cause is found for reversal, which would be the case if one reason out of ten were allowed, affords no ground for supposing that the other nine are also well founded. There is, in this case, nothing, from which it can be inferred, that the Court proceeded upon one reason more than another. The decree of reversal may be right, and yet the complainant may have good ground to maintain her present bill. The reversed decree admitted *Mary Har-*

vey as co-heiress with *John Mowry*. It is now alleged, that *Mary Harvey* is sole heiress. Surely, the commencing of an action by mistake jointly with another in a state court, cannot preclude the party from suing alone in a court of the *United States*.

It is farther contended for the defendant, that the original cause is now reinstated. But in truth there is now no cause in the Probate Court. There were two plaintiffs, who obtained a decree of distribution. This decree, on appeal, has been generally reversed. The case is to be governed by the same principles, as if there had been two plaintiffs in *assumpsit*. It is said, however, the cause was remitted. But why was it remitted? Evidently for no other purpose, than to enable the Judge of Probate to go on and settle the administrator's account. The controversy between these parties never could have been remitted. There is, at this moment, no suit pending, in any court of this state, at the promotion of the complainant, either alone or jointly with *John Mowry*. And even if a suit were pending, she has the right, at any time, to discontinue and abandon it, and she has done all in her power to effect such discontinuance.

It is, indeed, provided by a state law, that an heir before he brings any action for his share, shall have it settled and ascertained by the Probate Court; but this applies solely to the courts of law, there being no chancery court in *Massachusetts*.

Otis. When an action is brought by two, and the judgment is reversed, though one of them has good cause of action, that one, it is true, may afterwards sue alone. But the reason is, that the court cannot sever, and order the cause to proceed as to one of the parties. It is otherwise in the present case. The court might sever, and either

decree the whole to *Mary Harvey*, or send the cause back to the inferior court for an inquiry into her rights.

STORY, J. (after having stated the pleadings.) The question is, whether this plea, as pleaded, is a good bar to the present bill. It is argued on the part of the defendant in the affirmative on various grounds, which I will, in the course of this opinion, distinctly consider.

It is to be recollected, that the proceedings before the Probate Court were not between the same parties, as in the present; there was a joinder of *John Mowry* with the present plaintiff, and unless in probate proceedings the parties are considered as prosecuting severally and for their several interests, as well as jointly, according to the course of the civil law, there would be a difficulty in sustaining the conclusiveness of the decree of the Probate Court upon technical principles, even supposing such decree to purport all that the defendant now contends for; for such a decree, in general, would only bind parties and privies, and the present case would not be between the same parties. But waiving all controversy on this point, let us now proceed to the consideration of the legal effect of the decree, supposing it in fact to have been made between the same parties.

The decree of the Supreme Court of Probate purports, on the face of it to be, a simple reversal of the decree of the inferior court, and a remitter of the cause to that court for farther proceedings. It does not therefore assume to make any conclusive or final decision on any rights or interests of the parties, but leaves those rights and interests precisely as they were before the original decree was made, unless by intendment of law a different result is to be attributed to such a decree.

At common law, if a plaintiff obtain a judgment in an inferior tribunal, which is reversed in the appellate court,

it is very clear, that the reversal operates no farther, than to nullify the original judgment. In other respects, the parties are precisely in the same situation, as to their rights and remedies touching the matter in controversy, as if no such judgment had ever existed. If this case then were to be tried by the common law, the defendant's counsel could not sustain their objection. Upon what principles is a simple reversal of a probate decree to be held to have a more extensive operation?

It is argued, that the reversal in this case must have been upon the merits of the controversy between the parties, for all or some of the reasons assigned in the reasons of appeal, and therefore conclusive upon the parties, as the sentence of a court of competent jurisdiction upon the identical questions now before this Court.

It is difficult to perceive on what principles of law this argument is founded, and no authority in point has been adduced. The general doctrine is laid down with admirable clearness in the *Dutchess of Kingston's case*,⁷ by the Lord Chief Justice of the Common Pleas, in delivering the opinion of all the judges.

He says, "From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true :—First, that the judgment of a court of competent jurisdiction, *directly upon the point*, is, as a plea, a bar, or, as evidence, conclusive between the same parties, upon the same matter, *directly in question* in another court. Secondly, that the judgment of a court of exclusive jurisdiction, *directly upon the point*, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any

⁷ 11 St. Tri. 198—S. C. Hale Hist. C. Law, by Runnington—note C. p. 30.

matter, which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be *inferred by argument from the judgment.*"

Now in the probate decree before the Court, there is no decision of the court directly upon any point of fact or of law; and upon what grounds the decree itself was founded is nowhere stated, and cannot be collected by argument or inference; and even if it could, we are informed from the highest authority, that it would not be conclusive in another suit.

The argument too proceeds upon a supposition, that in probate appeals the court are confined to the reasons of appeal, and cannot decree *aliunde*. But the statute of *Massachusetts* of the 12th of March, 1784, ch. 40¹ contains no such limitation; and therefore, upon general principles, applicable to appeals according to the course of the civil and ecclesiastical law, the whole cause stands *de novo* in the appellate court, and may be decided upon, unaffected by the preceding sentence. But if it were otherwise, the case would present intrinsic difficulty, for it would still be uncertain, what was the particular reason, upon which the reversal proceeded; and some at least of the reasons would seem in the nature only of temporary bars. Besides, there may be errors on the face of the decree, or the proceedings, untouched in the reasons of appeal, which may well authorize a simple reversal; yet the argument assumes, that the Court were bound to adjudge between the parties, as to the merits of the appeal, in the manner by them stated, notwithstanding the most unquestionable errors.

Another fatal objection to the argument is, that it attributes to a mere reversal of a decree all the legal efficacy of a subsisting decree upon the merits.

¹ 1 *Mass. L.* 155.

It is in general true, that a judgment or decree upon the merits of any cause of action is conclusive as to the rights of the same parties, while the judgment or decree remains in force; and if the same judgment or decree find any particular fact or issue directly, the same operates by way of estoppel conclusively upon the parties, while the record is in force. But a reversal, with few exceptions, affirms nothing but its own correctness. It simply nullifies the former judgment or decree, and declares that it shall henceforth be deemed void. It decides nothing upon the rights of the parties; but confines itself to the adjudication, that what has been done shall have no legal effect. To give it a more extensive operation, either as a bar or as an estoppel, it is necessary to shew, that it directly affirms or denies some distinct fact in issue. There is no pretence, that the present decree, on the face of it, does either.

It is farther argued, that if the reversal be not a conclusive bar by its intrinsic force, it operates so indirectly, in as much as the plaintiff is estopped, by her election to proceed in the Probate Court, from pursuing any remedy elsewhere. I know of no such estoppel in this case. In general, the pursuit of a remedy at law, which has become fruitless, is no bar to the pursuit of a remedy in equity for the same subject matter. So far from it, that in many instances, the whole equity grows out of the incompetency of the law to afford any adequate relief. Much less is it true, that an election to proceed in one court of competent jurisdiction, either of law or equity, where the suit is abandoned, operates as an estoppel to another suit in any other competent court.

It is farther argued, that the present bill ought not to be sustained, because the original suit is still pending in the Probate Court and undetermined, and to assume jurisdiction would be to oust that court of its concurrent cognizance

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of the cause. Admitting that on a demurrer to a plea in bar like the present, such a consideration could properly arise, (which in point of law cannot be conceded) the objection cannot be sustained, for there is no allegation of the actual pendency of such a suit; and if there were, it could not be pleaded in bar, but simply in abatement of the present bill. But in point of fact, upon the remitter of the cause from the Supreme Court of Probate, I take it to be clear, that the cause could not again depend in the inferior court, until the parties had done some act, by which the authority of that court was called again into exercise.

An argument *ab inconvenienti* has also been drawn from the supposed conflict of jurisdictions, which may ensue, if this Court should sustain its jurisdiction over this cause. To arguments of this sort, in proper cases, this Court will be disposed to listen with all possible deference. We shall not incline to encroach on the state authorities, or seek to withdraw causes from their proper forum. But when a suit is instituted by competent parties, on a subject matter cognizable by the Court, I know of no authority that will justify us in declining the jurisdiction. We are not at liberty to shrink from the discharge of duties imposed upon us by the law, or to violate the rights of parties regularly before us, merely because the cause may occasion personal or public inconvenience. Such considerations belong to another tribunal.

On the whole, I am very clear, that the plea in bar is insufficient, and must be overruled.

Selfridge and Dexter for plaintiff.

Otis and Hubbard for the defendant.

PAYSON, &c. vs. COOLIDGE & AL.

A promise to accept a non-existing bill, shewn to a third person, who upon the faith of such promise takes it for a valuable consideration, is in law an acceptance of such bill, when drawn.—And it is immaterial, whether the consideration allowed by the holder was a *debt* previously due to him from the drawers, or money advanced to them at the time of receiving the draft.

What is sufficient evidence of an admission by the acceptors of an endorsement to the holders of a bill.

ASSUMPSIT on a bill of exchange drawn at *Baltimore* on the 7th of March, 1814, by Messrs. *Cornthwait* and *Carey*, for 2000 dollars, upon the defendants at *Boston*, payable at sight, to the order of *John Randall*, and by him endorsed to the plaintiffs. The declaration alleged the bill to be duly accepted by the defendants.

At the trial upon the general issue, the endorsement was denied, and, to prove it, the plaintiffs offered in evidence the affidavit of *Coolidge* (one of the defendants,) filed in this cause to procure a continuance thereof. The affidavit, among other things, stated that the deponent expected to prove by Messrs. *Cornthwait* and *Carey*, that previous to the first day of March, 1814, they (Messrs. *Cornthwait* and *Carey*) were indebted to the plaintiffs in a larger sum of money, than 2000 dollars, and that, finding themselves unable to pay the plaintiffs, they gave them a draft on the defendants on the *fourteenth*¹ day of March, 1814, for 2000 dollars, in part payment of their demand, without a knowledge of what the defendants had written to Messrs. *Cornthwait* and *Carey*; and that the said draft was not taken by the plaintiffs in consequence of any supposed promise on the

¹ The draft was really dated on the *seventh*, and not on the *fourteenth* of March: but as no other draft had been given for 2000 dollars, and that of the seventh was the only one in controversy between the parties, it was admitted to be a mere unintentional misdescription of the draft.

part of the defendants to accept the same, but was taken by the plaintiffs in the hope of receiving a part of their said debt from funds supposed to be in the defendants' hands, they (Messrs. *Cornthwait* and *Carey*) being at that time embarrassed and unable to pay the plaintiffs' demand, which the plaintiffs well knew, &c. &c. ; and that, without proof of these and other facts stated in the affidavit, the defendants could not safely proceed to trial.—To the admission of this affidavit, for the purpose of proving the endorsement to the plaintiffs by *Randall*, the defendants by their counsel objected.

STORY, J. We are of opinion, that the affidavit, taken in connexion with the bill, is proper evidence to be left to the jury, from which they may infer an admission by the defendants, that the plaintiffs are the legal holders of the bill.—It is true, that the bill is not accurately described in the affidavit, and this by mere mistake, as it must be presumed, for there is no reason to suppose a deliberate intention to commit perjury. But there cannot be a doubt, that the bill declared on, and the bill described in the affidavit, are the same, and that the affidavit contemplated them as such.—How otherwise could the existence of such a bill, or the circumstances, under which it was obtained, be at all material to the defence of the deponent? Supposing this to be so, there is strong evidence to shew, that the plaintiffs are the legal holders of the bill, for the defendants admit, that it came lawfully to their possession for a valuable consideration.—Indeed, the whole defence stated in the affidavit turns upon the supposition, that the plaintiffs have a good title to the bill, but that it was not received under circumstances, which bind the defendants to an acceptance.—Let the affidavit be read to the jury. *Valeat quantum valere potest.*

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In the farther progress of the cause, it appeared that previous to the existence of the present bill, *viz.* on the 21st of February, 1814, Messrs. *Cornthwait* and *Carey* drew another bill on the defendants for the sum of 2700 dollars payable to *Randall*, and by him endorsed to the plaintiffs, which was sent to *Boston*, and there protested by the plaintiffs for non-acceptance, and afterwards returned protested, and information of the non-acceptance was first received by the drawers in a letter from the defendants dated the 28th of the same month of February.—The letter was as follows: “Yours of the 21st instant is at hand this morning, as also a letter from Mr. *Williams* with a bond of indemnity. This bond, conformably to our laws, is not executed as it ought to be, but it may be otherwise in your state. It will therefore be necessary to satisfy us the *scroll* is correct and legal with you instead of a *seal*. We notice no seal to any of the signatures. We regret that you were so hasty in again drawing on us before the business was adjusted, and then even for a sum exceeding the nominal balance of accounts, which compels us to note the draft. *We shall write our friend Williams per this mail, and will state to him our ideas respecting the bond, which he will probably determine. If Mr. Williams feels satisfied on this point, he will inform you, and in that case your draft for 2000 dollars will be honoured.* The balance may stand to cover expenses, which may probably be demanded before we hear from you again, even if a favourable decision takes place. We do not wish for any benefit to ourselves, but really should think the whole had better remain till the present Supreme Court is over, when probably the cause will be decided, and if favourably, the whole can be settled in a moment.” &c. &c.²

² This part of the letter alludes to the case of the *Hiram* then pending in the Supreme Court of the *United States*. This vessel was cap-

The letter written to Mr. *Williams* by the defendants was of the same date, and as follows: "Yours of the 21st is at hand covering *Cornthwait* and *Carey's* bond, which we notice is signed, and a scroll instead of a seal affixed to the signature, which here would not be considered a sealed instrument and legally executed—will you determine whether that is considered, without any question, legal with you; and if you do not find it is, an instrument legally executed must be forwarded instead of it. You know the object of the bond, and of course see the propriety of our having one not only legal, but signed by sureties of unquestionable responsibility, respecting which we shall wholly rely on your judgment. You mention the last surety as being responsible; what think you of the others? They have very hastily drawn on us for 2700 dollars, somewhat more than the nominal balance of account, which it mortifies us to refuse; but the fault is theirs, and we have written respecting the bond, &c. and told them, you would be able to decide, whether we could consistently honour this draft to amount of 2000 dollars, a sum we should pay, provided you are satisfied the instrument sent us is legal, and the signers of unquestionable solidity, such as you would receive for a debt due you, payable in two or three years, as you know, if not decided at the present term of the Supreme Court, it will not be for a year at least; or, in case they execute another bond instead of this, provided you find that necessary, which we will return you or them on receipt of the other.—You will confer on us a favour by doing in this business the same, as though you were in our place." These letters were duly sent by mail. On or about the 5th of March, 1814, *Samuel Carey*, of the firm of *Cornthwait* and *Carey*, called

tured on a voyage to *Lisbon*, having a British license; Messrs. *Cornthwait* and *Carey* were shippers; and the proceeds had been delivered to Messrs. *Coolidge & Co.* as agents of *Cornthwait* and *Carey*, on bail. The bill was drawn on these funds. See the *Hiram*, 8 *Cranch*, R. 444.

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on Mr. *Williams*, at his counting room in *Baltimore*, to know if the latter had satisfied the defendants as to the sufficiency of the bond, to which inquiry Mr. *Williams* stated the substance, and read a part of a letter written by him that day to the defendants. On the same day, one of the house of the plaintiffs called to know, if Mr. *Williams* had written the defendants in a manner calculated to satisfy them on the subject of the bond, to whom Mr. *Williams* stated as he had before done to Mr. *Carey*, and also read a copy of his letter to the defendants. This letter, dated the 5th of March, was as follows:—"I have received by this morning's mail your favour of the 28th ultimo; and am assured, that the bond transmitted to you is executed conformably to the usual mode here; and that it is sufficient for the purposes for which it was given, provided the parties possess the means. And of the last signer I have no hesitation in expressing my firm belief of his being able to meet the whole amount himself; of the principals I cannot speak with so much confidence, not being well acquainted with their resources. Under all the circumstances, I should not feel inclined to withhold from them any portion of the funds, for which the bonds were given."—The draft was afterwards taken by the plaintiffs on the 7th of March, and presented to the defendants for acceptance on the 14th of the same month, who refused to accept or pay the same.

Hubbard, for the defendants, contended, that upon this evidence the plaintiffs were not entitled to recover. 1. Because there was no acceptance of the bill. A promise to accept a non-existing bill is not in point of law an acceptance, although taken on the faith of such promise. Even if a different rule were admitted to exist in ordinary cases, it would not apply to this case, for here the bill was taken for a *pre-existing* debt. 2. The defendants are not bound by

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the answer of *Williams*, for he did not pursue the special authority given him. All the signers were not of unquestionable solidity. And he cited *Storer vs. Logan*, 9 *Mass. R.* 55.

Prescott, for the plaintiffs *e contra*, affirmed the law to be for the plaintiffs on both points.

STORY, J. I take it to be clearly settled, that a promise to accept a non-existing bill, if shewn to a third person, who, upon the faith of such promise, receives the draft for a valuable consideration, is in point of law an acceptance. Such was the doctrine of Lord *Manafield* in *Pillans vs. Van Meirop*,³ and *Mason vs. Hunt*,⁴ which, though sometimes doubted in later times, has never been overruled, and in my judgment stands supported by principles of public policy and convenience. I shall adhere to that doctrine until a different rule is taught me by a tribunal, which I am bound to obey. There is no foundation for the distinction, asserted by the defendants' counsel, as to receiving such a draft for a *pre-existing* debt. It is sufficient, that it is received for a fair and valuable consideration, and on the faith of a promise by the drawers to accept it. Although a debt be already due, the party who receives such a draft in part payment, thereby as much gives credit to the drawer and acceptor, as a party who advances his money upon the draft. In respect to Mr. *Williams*, it is clear that the letter written to him by the defendants was not shewn to the drawers or to the plaintiffs, and therefore they have nothing to do with his private instructions. The defendants referred the drawers to him for an answer to certain questions, and agreed to be bound by his answers; and if Mr. *Williams* gave such an answer, as satisfied the terms of the de-

³ 3 *Burr*, R. 1663. ⁴ *Doug.* R. 297.

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fendants' letter to the drawers, it binds the defendants as an absolute agreement by them to accept a draft for 2000 dollars.

The questions for the jury therefore are, upon the whole evidence, whether *Williams*, upon the application of the plaintiffs, after they had seen the letter addressed to the drawers, did declare himself satisfied with the bond referred to in the letter; and whether the plaintiffs took the present draft upon the faith of that letter and of *Williams's* declaration. If so, then the plaintiffs are entitled to recover, notwithstanding the consideration for the draft, as between them and the drawers, was a pre-existing debt, or, to bring it to the present case, was a part payment of the previous bill drawn for 2700 dollars. And even supposing, (what does not appear,) that *Williams*, under all the circumstances, did exceed the private instructions given to him by the defendants, still, as those instructions were not communicated to the plaintiffs, it cannot affect the right of the plaintiffs to a recovery.

DAVIS, District Judge, concurred.

*Verdict for the Plaintiffs.*⁵

⁵ See *Pierson vs. Dunlop*, *Comp. R.* 572—574.—*Johnson vs. Collins*, 1 *East*, *R.* 98.—*Clarke vs. Cock*, 4 *East*, *R.* 57.—*Wynne vs. Raikes*, 5 *East*, *R.* 514.—*Wilson vs. Clements*, 3 *Mass. R.* 1.—*Banorgee vs. Hovey*, 5 *Mass. R.* 11.—*Storer vs. Logan*, 9 *Mass. R.* 55.—*Mc'Evers vs. Mason*, 10 *John. R.* 207.—*Van Reimsdyk vs. Kain*, *Ante.* 1 *Vol.* 630—641.

On a writ of error to the Supreme Court, the judgment in this case of *Payson vs. Coolidge* was affirmed—2 *Wheat. R.* 66.

Rover.

THE ROVER.

Where there is probable cause of capture, the captors are justified, and exonerated from all losses and damages sustained by reason of the capture. What constitutes such probable cause.

On a monition to proceed to adjudication, the cause is to be heard in the same manner and upon the same principles, as upon a libel by the captors; and consequently the *onus probandi* rests on the claimant.

Where, after capture, the vessel has been recaptured by the enemy, and proceeded against in a court of prize, the court will not suffer a part of the papers from such court to be read, to shew, that there was no original cause of capture, unless the whole papers are produced.

In this case, a monition to proceed to adjudication had been issued, upon the libel and suggestion of *A. Wood, jun.* against the owners and commander of the private armed schooner *Regulator*. The respondents, in their answer, alleged that the *Rover* was lawfully detained upon the high seas for examination and search, and, in consequence of suspicious appearances, was ordered for the nearest port of the *United States*; but shortly after was captured by a British brig of war, carried to *Halifax*, and condemned.

Pitman, for the captors, after stating the causes of suspicion, contended, that before calling upon the captors to proceed to adjudication, the practice required, that a claim should be given, and affidavit filed.

STORY, J. Usually a claim is given before a monition is taken out against the captors. But there may be an original proceeding, as in this case. There ought, however, to be an affidavit, and, on motion, the court would put the libellant upon his corporal oath.

Amory and Dexter for the libellants. 1. The capture cannot be justified on the ground of a suspected intention

to violate a municipal law. Probable cause has no application to such a seizure.¹ Nor does it come within the scope of the commission, which authorizes the commander to seize only *jure belli*. 2. There was no probable cause, to justify the seizure as prize of war. *Wood's* property was sufficiently proved by the documents on board. The bill of lading expressly declares the owner of the vessel to be also owner of the cargo. 3. The libellant is entitled in damages to the value of the property at the time of the capture. It is not necessary to inquire, whether the capture by the British was a direct consequence of that by the privateer, or not. He, who takes property out of the hands of an agent appointed by the owner, and commits it to the possession of another, assumes, from that moment, the risk of its safe keeping.

Prescott, for the respondents. The capture by the British was not in consequence of any act of the American captors. The vessel pursued the same course, good navigators were put on board, and every proper care was taken.

Reasonable cause to believe that a municipal law had been violated is sufficient to justify the captors. The attempted distinction does not exist. Whether the seizure be as prize, or for the breach of a municipal law, the property, in either case, vests in the sovereign, and the proceeding must be summary, because the seizure is on the high seas. There is no difference, in this respect, between the commissions of public and of private armed ships.

STORY, J. The common law authorizes every individual to seize for the King, and if there be an actual violation of law, the seizer is protected. Upon this ground, it

¹ *Little vs. Barreme*, 2 *Cranch*, R. 170.

has been held, that public and private armed ships may seize for the breach of a statute. But it is at the peril of the party making the seizure.

Dexter. The commission does not extend to such a seizure.

STORY, J. The party, who has been guilty of illegal conduct, will not be permitted to claim in court. The property is of course condemned as prize of war, or as enemies' property, to the government, for want of a claim.²

Prescott. The only question then is, whether, in this case, there was probable cause to suspect a violation of law? It is contended, upon the evidence, that there was. The documentary evidence of property was deficient. Added to this, the master's prevarication, the concealment of the owner's name in the bill of lading, and the absence of the invoice, which, if on board, was not exhibited, were strong circumstances of suspicion.³

STORY, J. The schooner *Rover*, owned by *Abiel Wood, jun.* of *Wiscassett*, was captured on the 17th of July, 1812, by the private armed schooner *Regulator*, commanded by *James Mansfield*, on a voyage from *Liverpool* in *Great Britain* ostensibly to *Amelia Island*. The *Rover* sailed from *Liverpool* about the 15th of June, 1812, having on board a cargo of British merchandise, consisting of crates, coal and hardware. Two days after the capture, the *Rover* was recaptured by the British sloop of war

² *The Walsingham Packet*, 2 Rob. R. 77.—*The Venus*, 8 Cranch, R. 253.

³ *Murray vs. Charming Betsy*, 2 Cranch, R. 71, 122.—*Little vs. Berreme*, 2 Cranch, R. 170.—*Maloy vs. Shattuck*, 3 Cranch, R. 430.

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Ring Dove, and carried into *Halifax*, and for aught that appears has been condemned.

A monition to proceed to adjudication was afterwards served upon the owners of the *Regulator*, at the instance of Mr. *Wood*, and upon the libel and proceedings in the cause the single question was, whether there was probable cause of seizure as prize. At the hearing in the District Court, the learned Judge pronounced a decree in the affirmative, and upon that decree an appeal has been interposed to this Court.

The whole cause here turns upon a mere question of fact, the law being conceded on all sides, that if, from all the circumstances, there was probable cause of seizure, the captors are completely justified and exonerated from all consequential damages. And, in my judgment, the cause must be heard in the same manner, and upon the same principles, as if it were an original hearing upon a prize allegation; and consequently the *onus probandi* of shewing the neutral character of the property must rest on the libellant.⁴ There is another reason also for this rule in the present case, which is, that the libellant, in claiming damages, is emphatically the actor. The cause too ought to be decided upon the same principles, as if all the original papers, which were submitted to the captors, were now before the Court. All these papers are yet in existence, and indeed the *Rover* seems to have been proceeded against in the Vice Admiralty Court at *Halifax*, in whose registry the whole ship's papers and documents have been deposited. These papers are not inaccessible to Mr. *Wood*, for he has produced attested copies of three documents, which were delivered out by the regular officers of that court. I am called upon to admit these papers as legal

⁴ *The Walsingham Packet*, 2 Rob. 77.—*The Countess of Lauderdale*, 4 Rob. 283.—2 Azuni, 215. sec. 12.

evidence, for the purpose of rebutting all pretence of the legality of the capture, and to shew the neutrality of the property. It would have been more fair to the parties, and certainly more satisfactory to the Court, to have had an authenticated copy of all the papers. For it is very clear from the evidence before the Court, that there are several papers not produced, which might have had a very important bearing on the cause. The two letters, addressed to Mr. *Wood* by the shipper, might have been very significant. And the answers of the master to the standing interrogatories would, in a conflict of testimony, have derived a peculiar importance, if not in chief, at least as corroborative evidence. This documentary evidence is objected to by the captors, and although, if admitted, it would, by itself, have little weight with the Court, coming, as it does, in a solitary and disconnected shape, after the pressure of the other testimony was fully known, and of course the importance of the other ship's papers and documents fully established; yet, as the objection is taken, it may not be improper to express my present opinion. And I am of opinion, that, in proceedings of this nature, it is inadmissible. If the party seeks to avail himself of the supposed confession of the ship's papers, he ought to produce the whole, that a judgment may be drawn from the whole, as to his legal right to damages. He asserts, that there was no probable cause of seizure, and attempts to prove it by witnesses, and a partial production of some of the ship's papers, when he shews, that better evidence is yet behind within his own control. There is yet another reason why the whole proceedings in the prize court should have been produced, and that is, to rebut the imputation of enemy's property on board, and to prove that the libellant had sustained a total loss. In ordinary cases, a capture by the enemy might have been sufficient for the latter purpose.

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But, in this case, under all the circumstances, it seems to me that the libellant, having access, as it should seem, to the admiralty records, ought to have gone farther. Besides, if the present papers were admitted, it would not follow that they were shewn to the captors; nor that other papers, as asserted in the testimony of the captors, were not on board at the time of the capture. But I decide this objection on the general rule, which appears to me to be a safe and salutary one, that the party who relies upon the evidence of the ship's papers to prove or rebut any hostile interest, ought, if they are in existence and within his control, to produce the whole, otherwise the Court will not listen to partial extracts. In so deciding, I do not mean to assert, that where property and papers are captured by an enemy, it is in general necessary to trace them farther. The presumption is, that they are inaccessible, and secondary evidence is good. But if you shew them within your control, you are not at liberty to withhold or present what you please. The whole must be produced, or the whole withdrawn from the cause.

I shall not, however, reject the evidence, because in my judgment the cause may well be decided consistently with the real rights of the parties upon its admission, for it is at most but a corroboration of what the master has peremptorily sworn in his deposition, and he has annexed to it a copy of the material paper, the invoice. There are two invoices of the whole cargo transmitted from the admiralty records, which are different both in items and value, the one being *l.* 1110 *3s.* 6*d.*, the other *l.* 616 *12s.* What could have been the intention of this suppression and false valuation I pretend not to decide. It cannot however but lead to an inference, which I should be very loth to entertain, that there was a secret design to defraud the revenue of some country; and as duties are here calculated on the

ad valorem articles on the invoice value, the conjecture would not be strained, if the *United States* might seem pointed at in this contrivance. I pretend not, however, to lay any great stress on it, except that if damages were to be allowed to the party, I should hold him bound by the lesser invoice. "*Qui sentit commodum, sentire debet et onus.*"

The causes, which are now relied on by the captors to justify or excuse the capture, are the want of a clearance, the prevarication of the master, the suppression of the invoices, the want of sufficient proofs of property, the deviation from the destination apparent upon the ship's papers, and the suspicion of an intended illegal importation into the *United States* of British merchandise. On examining prize decisions, a great indulgence in this respect seems to have been allowed to captors, where they have acted with good faith; and in the *Peacock*⁵ and the *St. Antonius*⁶ it seems to have been held a sufficient excuse, that the vessel was found with a false destination, or under circumstances of deviation from her voyage. The latter case is exceedingly strong, and came by appeal from the High Court of Admiralty, where damages were denied, and that decision was confirmed by the Lords Commissioners with costs. It was the case of an *English* vessel, trading under a license with *Holland*, and found on the *Dutch* coast, but loitering there, so that the captors suspected an intended destination for *Ostend* or *Dunkirk*, and the license was produced at the time of capture. That the vessel, in the present case, was found out of the course of the voyage for *Amelia Island*, cannot admit of a doubt. The circumstance of a want of a clearance seems now fully accounted for; but I still entertain great doubts, if this was not an irregularity at the custom house, unauthorized by law. Still, however,

⁵ 4 Rob. R. 185.

⁶ 1 Acton, 113.

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it was at most but an irregularity, and standing alone, it could not have justified the capture. The other circumstances are certainly sufficient, if they are proved. And in this respect there is a conflict between the testimony of the master and the captors. The master has a direct interest, as well as bias, in the cause, as he may be responsible for his own misconduct; and therefore it was peculiarly fit to have had his testimony confirmed by a full and perfect production of the admiralty proceedings. I observe too, that in respect to a material paper, which is represented to have been on board, he speaks guardedly, and in annexing what purports to be a copy, he does not pretend to verify it by any collation with the original, but simply expresses a belief as to its correctness; a belief from aught that appears, resting merely on memory of the contents. Why was not a copy of the original produced from the admiralty?

It is true also, that the captor's witnesses are affected with a natural, and perhaps unavoidable, bias the other way. They have not however any interest in the present suit, for let it be determined as it may, they are free from responsibility. The testimony of *Harris* and *Manning*, in particular, is very circumstantial, and minute, and after weighing all the circumstances, it appears to me that the arguments in favour of its credibility greatly preponderate over those of the master's. If they are to be believed, the conduct of the master was calculated to awaken and inflame suspicions against the *bona fide* character of the voyage and of the cargo. He reluctantly, and after evasions, disclosed his papers in piece-meals; and his contingent destination to the *United States*, even after a knowledge of the war, seems to have been drawn from him by the pressure of importunity, if not by the determination to send the vessel in for adjudication. Nor was his previous equivocation, in rela-

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tion to his deviation from the voyage, calculated to lull any suspicions, which had been awakened, when a new explanation was given, founded on an asserted original destination to the *United States*, instead of an alteration of the course by necessity.

It should seem too, that there were two bills of lading on board, in neither of which was there a consignment to Mr. *Wood*, although it would have been natural to expect one, adapted to the contingent destination to the *United States*. There were also two letters on board for Mr. *Wood*, one of which was opened, and contained no statement that the property belonged to him. We have no account of the other, but if favourable to the present claim, why has not an authentic copy been produced to the Court? There was, too, a suppression of the invoice, if we credit the witnesses, and this is always so material, that its absence may well occasion a reasonable doubt of the property, especially when combined with the circumstance, that the cargo consisted of prohibited goods, found near the coasts of the *United States*.

Looking to all the facts of the case, as presented by the evidence, and to the absence of what must be deemed material papers, which the libellant might have produced, if they would have made in his favour, I should think myself pressing the law in relation to captures with unreasonable rigour, if I were to decree damages. I shall, therefore, affirm the decree of the District Court.

Libel dismissed.

George.

THE GEORGE AND CARGO.

A case of collusive capture. Regularly no delivery on bail of prize property ought to be made, either to the captors or the claimant, until after a hearing of the cause. In most cases a sale is preferable to an appraisement, when the value is to be ascertained for the purpose of a delivery on bail.

Under what circumstances farther proof is admissible in cases of an asserted collusive capture. Farther proof in prize causes is never admitted by way of oral testimony; but always by written evidence and depositions.

THIS was a prize cause brought by appeal from the District Court of *Maine*. The facts are fully stated in the following opinion, delivered by

STORY, J. The schooner *George*, of the burthen of one hundred and thirteen tons, with her cargo, was captured, on or about the 13th day of January, 1814, by the private armed schooner *Fly* of *Portland*, owned by *Henry L. Dekoven*, master, and *William S. Sebor*, lieutenant of the same vessel. The privateer is described in her commission as of the tonnage of thirty-nine tons and twenty-eight ninety fifths, mounting four swivels and one carriage gun, and navigated by twenty men. In point of fact, there were only fifteen persons composing the crew, including the master and lieutenant, and prize master, who were the only officers on board; and the whole crew were hired on wages, and were to have no share whatsoever of prizes. At the time of the capture, the *George* was lying at anchor in *Long Island Harbour*, in the island of *Grand Manan*, a British possession in *Passamaquoddy Bay*, ostensibly bound to *Havanna*, in the island of *Cuba*. The cargo on board, with the exception of thirteen hogsheads of fish, and three hundred boxes of herrings, consisted entirely of British manufactures of great value, and ostensibly owned by British subjects resident in the British dominions. The *George* was in fact navigated by five persons, according to the allegation in her certificate of clearance and list of men, viz. by a master, a mate, two

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seamen and a cook, and the three last were of different nations, one a Portuguese, one a Greek, and one a Spaniard. There was also on board a supercargo. Immediately upon the capture, which was made without the slightest resistance, the whole crew, except the master, were sent on shore, and the prize was brought into the port of *Ellsworth*, where she was seized by the collector. It seems, that the cargo of the *George* was originally brought from *Halifax* to *St. Johns*, and that from the latter place the vessel sailed, on or about the 8th day of January, 1814, having on board convey instructions to rendezvous at *Etang Harbour*, whence she was to sail on her voyage. It is worthy, however, of remark, as it connects itself with the last deposition of *O. Thomas*, that the place of rendezvous in the original convey instructions, is written "*Halifax*," which is erased, and "*Etang Harbour*" substituted. It is also worthy of remark, that the same privateer, but a few days before, captured a valuable vessel bound ostensibly from *St. Andrews* to *Halifax*.

A prize allegation was filed in the District Court of *Maine* by the master of the *Fly*, and upon the return of the usual monition, the *United States* intervened, and claimed condemnation of the *George* and cargo, upon the ground that the capture was collusive, and a fraud upon the laws of the *United States*. Upon this claim the District Court admitted the parties to farther proof, and that having come in, after a full hearing, the vessel and cargo were condemned to the *United States*. From this decree the captors have appealed to this Court, and the cause has here been elaborately argued.

Before I proceed to the consideration of the principal questions in this case, I shall take occasion to examine some collateral points, to which our attention has been directed, and which, with a view of settling the practice in prize causes, are very proper for judicial deliberation.

George.

And it is a source of painful consideration, that notwithstanding the many instances, in which this Court has had occasion to express its disapprobation of the indiscriminate delivery of prize property on bail, contrary to the regular course of prize courts, to whomsoever shall choose to make himself a claimant, however weak, or fraudulent, or illegal, his title may be, that practice still continues. In the present case, after the *United States* had seized the property, and interposed a claim, on the ground of fraud, and before a hearing of that claim, a delivery on bail of the whole prize property was allowed to the captors after an appraisement. It is notorious, that such appraisements, when made with good faith, are extremely unsatisfactory; and in many instances it is equally notorious, that in appraisements the grossest impositions have been practised upon the Court. Why, in all cases of prize property, a sale, instead of a delivery on bail, should not be made, pending the prize proceedings, where the goods are really destined for sale in this country, it is not easy to answer. It would at least have this good effect, that it would at once suppress fraudulent claims by taking away the temptation to iniquitous practices, and it would repel from the public tribunals much of that reproach, which has been undeservedly cast upon them. In making these remarks, I wish to be understood, as not meaning to convey the slightest imputation upon the venerable Judge of the District Court of *Maine*. The evils are not attributable to himself; but to those irregularities of practice, as well in respect to delivery on bail, as other incidental proceedings, which have so much embarrassed the appellate Court in revising the decisions from the District of *Maine*.

The principal point, however, which has called for the attention of the Court, is the practice, which is to govern in this novel proceeding on the part of the *United States*. There can be no doubt, that the *United States* may well

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intervene in prize causes to secure and enforce their rights, whether growing out of the breach of municipal regulations, or of the laws of war. In the present case, such an intervention was peculiarly fit, for without doubt the property either belonged to the enemy, or to American citizens, who in this transaction must be deemed enemies. The question then occurs, whether the *United States* or the captors are entitled to introduce farther proof, to sustain their relative rights, after all questions as to the character of the property itself have been settled. As to the *United States*, if they choose to rest their claim upon the facts apparent upon the record growing out of the prize proceedings, there is no reason in general for the admission of farther proof. But if the fraud of the captors, or of the captured, is to be made out by evidence *aliunde*, it seems to me not only competent, but the indispensable duty of the Court, to direct such farther proof, and to issue commissions for this purpose. And where such farther proof is admissible, it should in general be open to both parties, and always be by depositions and written evidence. Mere oral testimony is inadmissible in prize proceedings. There are exceptions, however, to the admission of farther proof on behalf of the asserted captors; for if they have acted with gross ill faith, or gross negligence, the attendant of fraud, the Court ought not to trust those with an order for farther proof, who have thus shewn that they mean to abuse it. This rule will be a salutary check upon captors, and will materially subserve the public interests, by suppressing fraudulent connivances, destructive of public morals. The admission of the farther proof in the District Court of *Maine* was, therefore, regular and proper; although it is to be regretted, that it was not taken by commission under an order distinctly allowed for this purpose.

Let us now proceed to the merits of the controversy as between the *United States* and the captors, for there is no

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claim on behalf of the captured. And here, at the very threshold of the cause, the Court are called upon by the counsel for the captors, with an eloquence, to which it is impossible to yield too high a homage, to disentangle themselves from all prejudices and suspicions, and to believe the whole transaction a fair one, until it is proved otherwise by plenary evidence of fraud. We are emphatically reminded of the danger of trusting to appearances, as the guide of judgment, and of the extreme indiscretion of hazarding conjectures, which mislead the more as ingenuity or confidence of mind induce us to indulge them. For myself, I receive the admonition, with real pleasure, and have no inclination to undervalue its real force. For persons of exalted genius and authoritative learning, it may not be unfit to adopt the boldest pursuits on the ocean of conjecture. I pretend not to the rashness, or the ambition to hold so perilous a course. My humbler mind is content with humbler views, with judgments formed by patient inquiries, aided by the lights of authority and precedent. I content myself with plying the shore, as a more suitable task for those, who hope, by cautious diligence, to arrive at a port of safety. To drop figurative language, I may be permitted to say, that the duties of a judicial office require a constant and patient examination of evidence, which is not only sometimes irreconcilable, but often comes under circumstances, which make the task unwelcome and embarrassing. To allow ourselves to be carried away by slight suspicions, or doubts, would be to surrender our judgments, and to inflict upon suitors all the punishments attending upon the popular delusion, as to the uncertainty of the law. But, when we are called upon to weigh probabilities, to detect impositions, and unweave the web, which fraud and ingenuity, in this age of contrivance, industriously spread to ensnare and to deceive us, it would be the most extravagant of errors, to

shut our eyes against what is passing in the world, and would betray a visionary attachment to ideal virtue, wholly inconsistent with the sad lessons, which experience daily points out and verifies by example. A course of this nature would be a complete sacrifice of judicial functions, and, under the mockery of law, would surrender the rights of all honest men in the community.

If indeed the doctrine, which I now assert, need support, it will be found recognised by Sir *W. Scott* in the *Rosalie and Betty*.¹—"In considering this case," says that able Judge, "I am told, that I am to set off without any prejudice against the parties from any thing, that may have appeared in former cases; that I am not to consider former circumstances, but to suppose every case a true one till the fraud is actually apparent. This is undoubtedly the duty, in a general sense, of all who are in a judicial situation; but, at the same time, they are not to shut their eyes to what is generally passing in the world; to that obvious system of covering the property of the enemy, which, as the war advances, grows notoriously more artificial; higher prices are given for this secret and dishonourable service, and greater frauds become necessary; old modes are exploded, as fast as they are found ineffectual, and new expedients are devised to protect the unsound parts better from the view of the court. Not to know these facts, as matters of frequent and not unfamiliar occurrence, would be not to know the general nature of the subject, upon which the court is to decide; not to consider them at all would not be to do justice."

On a general survey of the case now before the Court, it cannot but be conceded, that it bears a considerable resemblance to that class of cases of collusive captures, which, though not new, are yet very unwelcome guests to the

¹ 2 Rob. 343:

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Court. The proximity of the District of *Maine* to the British territories, the numerous ports, with which it is indented, and the consequent facility of communication, afford the strongest temptations to illicit traffic, whenever the prices of British manufactures are so high in the *United States*, as to excite the cupidity of speculating and unprincipled men. The extravagant prices of British manufactures since the war have quickened this avaricious spirit, and the records of this and of the District Courts pronounce how extensive have been the combinations of the enemy and of some of our own citizens, to encourage and to protect this illegitimate commerce. Circumstances of this nature, though they may not justly awaken suspicions, are not likely to lull those, which have once been fairly excited.

Taken in connexion with these circumstances, the case before the Court may be considered in two views, *vis.* upon the intrinsic evidence, and upon the positive testimony, of collusion, which it presents.

I will, in the first place, advert to that view, which is apparent upon the transaction taken *per se*. And here it cannot be denied, that some of the circumstances, relied on by the *United States*, afford a very slight, if any, inference of fraud. In truth, they are just such, as might accompany an innocent transaction, though they might not be strangers to a premeditated imposition. It is hardly possible, in this age of refinement in fraud, that any transaction should wear that character upon its forehead. It would be unnatural and absurd, that every disguise should be thrown off, and an invitation given to the public to sift and detect the purposed mischief. No men in their senses, however bold or thoughtless, would fail to throw over their dishonourable projects, the grace and ease and simplicity of truth. On the other hand, a care, sedulously exercised, to repel every possible imputation of illegality, would give too artificial and

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studied an effect, to escape public notice. The systematic arrangement would betray its origin.

Apart then from these general circumstances, let us consider the conduct of the privateer and of the prize. In the first place, the armament, size and ownership, of the privateer, considering the advanced state of the war; and the diligence and force of the British navy on our coast, were not of such a nature as decisively to engage the assent of the mind in favour of the apparent intention of the parties. But connected with the extraordinary mode of hiring the crew, it is difficult to resist the impression, that something more was meant, than the ordinary employment of a cruise. This is the first instance, which has ever come before me, in which seamen have been hired on board of a privateer at monthly wages, and with an express release of all claims to the prizes captured during the cruise. The impolicy of such a stipulation is so obvious, that it seems hardly credible, that in any *bona fide* transaction it should find a place. It has a direct and immediate tendency to discourage all gallantry and enterprize, to sever the interests of the crew from that of the owners, and to afford temptations to plunderage and embezzlement of prizes. Men will not readily be induced to hazard their lives, where neither honour nor interest is at stake; much less will they guard with anxiety and vigilance, or defend with bravery and firmness, property, in which they have no hope of profit. I will venture to appeal to the knowledge of my learned brother in the District Court, and of every gentleman of the bar, when I assert, that in the great number of prizes, which have been adjudicated in our courts since the war, not a solitary case can be found, where such a very extraordinary stipulation has existed.

On the other hand, it is notorious, that high bounties, besides a full share of prize money, have been very frequently

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given, to induce seamen to engage in the service. So difficult has it been to secure adequate crews under all the allurements, which the enemy's commerce has afforded. And what is the inducement held forth in the present shipping articles for a release by the crew of their shares in prizes? The wages of twenty dollars per month, which the shipping articles denominate extraordinary wages. Now I will venture to appeal to the experience of all persons conversant with this business, that bounties as high as this have often been given or advanced; and that, as wages, the sum does not much, if at all, exceed the ordinary rate of hire, which has been given since the war for private services. There is but one way of solving the difficulty, which such a stipulation presents; and that is, that the voyage was intended for fraudulent purposes, and the captures were to be collusive. The service was contemplated to be short, and the wages were to be easily earned by a traffic without honour and without peril.

The conduct and equipment of the captured vessel were not less singular. She was loaded with a very valuable cargo of merchandise, all of which, with the exception of an insignificant quantity of fish and herring, which might have been thrown in by way of cover, was peculiarly fitted for the market of the *United States*. I will not say, that the cargo was not adapted for the *Havanna* market. In general, it probably was, for it is inconceivable that the parties, if they intended a fraud, should forget to make the destination at least plausible. It is sufficient for my purpose, that all the British manufactures were of a sort, which bore the highest price, and were most in demand in the *United States*. On the other hand, the cargo, however well adapted for sale in the *Havanna*, could not there, from the freedom of intercourse and the facility of trade, bear prices at all proportionate. And it is not a little extraordinary, that an indirect

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trade through the British provinces should, with the accumulation of double freights and expenses, be carried on, when the direct trade from *Great Britain* was open to the enterprises of her merchants. The crew of the *George* was also wholly inadequate for such a voyage in the winter season. Two seamen and a cook, who were foreigners, composed the crew for ordinary duty; and it is inconceivable that so valuable a cargo should have been entrusted with so small a crew for any thing more, than a mere coasting voyage. And why should foreigners be selected? It is said, that British seamen were scarce and liable to be impressed? But, however true this may be in the mother country, no one can doubt, that the provinces afford large numbers of seamen. The other equipments of the vessel for the voyage I do not think it necessary minutely to consider; though I must confess, that the testimony strongly impresses me with the belief, that they were not sufficient for the ostensible voyage.

The vessel also had convoy instructions, and orders to rendezvous, as it is affirmed, at *Etang Harbour*, so as to sail under the protection of convoy. Putting out of sight all question, whether *Halifax* was not the real station for convoy, which I incline to believe, why was not the *George* at *Etang Harbour*, conformably to her orders? She sailed, as it is apparent from her log-book and from the testimony in the case, with a wind fair for that port, and yet, so far from placing herself under the protection of convoy there, she voluntarily sought an open harbour in an exposed island, incapable of defence against any hostile attack, and obvious to every hostile cruiser. This extraordinary conduct is not attempted to be accounted for, and is indeed incapable of any rational explanation. It was certainly the height of madness, if the property and destination were *bona fide*; and I cannot but think, that there was too much method in this madness, to warrant a supposition of innocent delusion. And for

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what purpose was the *George* lying in *Long Island Harbour* for several days? Nothing appears to justify it.

The circumstances also of the capture are not a little singular. The privateer, it seems, had due notice of its destined prey while lying in an American port, and immediately sailed to obtain it, without even the benefit of an accurate pilot. The *George* was captured without the slightest resistance, while lying at anchor; and immediately her whole crew, except the captain, was sent on shore, and the prize manned for an American port. Now I would ask, why should the supercargo and the crew have been dismissed, to give the alarm, and increase the chance of a recapture? Why, so near an American port, should the captors have voluntarily relinquished the statutable bounty for every prisoner of war? Why should not the supercargo have been brought in, to answer on the standing interrogatories? Without pretending to answer these questions, I must say, that if the capture were collusive, there would be nothing extraordinary in these occurrences.

As to the papers found on board, there is nothing in them, which is decisive either way. Nothing is more easy, than the fabrication of papers; and these are as merely formal, as any that could be devised. It is notorious upon the records of our courts, that as illicit trade has become more inviting, places have changed their names; *Halifax* has become *St. Bartholomews*; and I know not why, in a given case, by a like metamorphosis, *Havanna* may not have become a port in the District of *Maine*.

These are some of the intrinsic circumstances of this transaction, which carry to my mind a pregnant presumption of collusion. They may, perhaps, have occurred in a *bona fide* voyage; but so rare would be the chance, and so extraordinary the coincidence, that the most sober judgment would pause, before it would incline to admit the probability.

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If we turn to the positive testimony in the case, every doubt of innocence must be strengthened, and every presumption of guilt inflamed. Much of the apparent difficulty in weighing the testimony will be avoided by taking all the depositions in a chronological order, and comparing the successive depositions of the same persons together. It is said, that the testimony of some of the witnesses, as to the confessions of the Messrs. *Merritts*, is incredible. I profess not to feel the force of this objection. I can perceive no reason, why persons engaged in smuggling, in the tide of success, and under circumstances of almost thoroughly imagined security, from past experience, as well as present hopes, should not, among persons of their own vocation, recount their success, or avow their intentions, with all the self-complacency of regular adventurers. So far as the testimony is impeached by credible witnesses, it undoubtedly abates its force; but after every reasonable deduction on this head, I am still of opinion, that the weight is in favour of its verity. But setting all the rest aside, the testimony of *James Crocker*, who stands wholly unimpeached and has no interest, would be decisive as to the collusion. It is difficult to read his statements, and not to yield to the conclusion, that the capture was collusive.

On the whole, I am for affirming the decree of the District Court. As this opinion is concurred in by the District Judge, let the

*Decree be affirmed.*¹

*Dexter and Kinsman for the captors,
G. Blake and Preble for the United States.*

¹ Upon an appeal to the Supreme Court, farther proof was directed, and upon its coming in, the Court, after full argument, affirmed the decree. 2 Wheat. R. 278.

THE COMMERCE—VICE CONSUL OF SWEDEN, CLAIMANT.

A neutral cannot lawfully become the carrier of provisions for the supply of the army of one of the belligerents, although such army may be in a neutral country, and directly engaged in hostilities only against a third belligerent.—A neutral ship engaged in such traffic is not entitled to freight.

Is what cases provisions are contraband.

THIS was an appeal on the part of the captors from so much of the decree of the District Court of *Maine*, as allowed freight to the owners of this vessel, which was restored as Swedish. She was captured on a voyage from *Limerick* in *Ireland* to *Bilboa*, carrying a cargo of grain, the property of British subjects, which appeared, from a letter found on board, to have been exported by the special permission of the British government for the supply of their army in *Spain*, and the shipper was required to produce a certificate of its being delivered for that use. The cargo was condemned in the District Court.

Dexter and *Kinsman*, for the captors. It is of no importance to inquire, whether the cargo consisted of articles, which are usually contraband, or not. Within the true spirit and meaning of the laws of nations, they became contraband from the character of the voyage. Provisions, though not in their nature contraband, are yet made so by circumstances; as when on their way to a besieged place. *Spain* at this time was so far exhausted, that provisions became as necessary, to enable the British to prosecute the war in that country, as they ever were to enable a besieged place to hold out. If, when shipped from one individual to another, they would have been contraband, how much more so in this case, where the shipment was made expressly for the use of a power at war with us, and by a permission, which in ordinary cases is rigorously withheld?'

Though the right of the neutral to freight is now generally admitted, yet there are not wanting respectable authorities in support of an opposite doctrine. *Bynkershoek* especially maintains, that the neutral ought to know the risk he takes, and to demand a rate of freight proportioned to it; and that, as he makes his own bargain, no freight ought to be allowed, unless he delivers his cargo at the port of destination. What is the reasoning opposed to this? It is founded entirely on the fiction, that the captor takes the place of the enemy shipper. This is not true. If it were, why should not the captor be bound by the contract for the purchase of the goods, if bought on credit, as well as by that for the carriage of them? The captor stands in the place of the enemy shipper as to rights only, but not as to duties. It may be said, that this is against authority; but we are bound by authority no farther, than it has actually gone. The rule as to freight has been encroached upon in several instances. What reason can be given for the exceptions of the colonial or coasting trade, which will not apply, with equal or greater force to the present case? The reason usually urged is, that by such trade the commerce of the enemy is aided—a most feeble reason, compared with that, which exists in the case before the Court. Here not only was aid afforded to commerce, but direct assistance was given in the prosecution of the war. That the army, for which these supplies were intended, was not acting against us, cannot affect the question. The relief afforded to our enemy in his operations against one hostile power, left him at liberty to employ the greater resources against us. We may appeal to the very facts of the present case; for Lord *Wellington's* army, after being successful in *Spain*, was transported to the *United States*, and is at this moment making war upon our shores.

Prescott, for the claimant. The rule, which allows freight to the neutral carrier of enemy's goods, is ancient and well established. Though questioned by *Bynkershoek*, it is recognised by nearly all other writers on maritime law, and by the *Consolato del Mare*. It is founded upon the principle, that the rights of the neutral are no farther to be interfered with, than may be necessary for the prosecution of the war. His lawful contracts are not to be disturbed, and among these is the employment of his ships in carrying the property of a nation in amity with him. The restrictions upon this right are accurately defined. He is to carry on no unlawful trade. The coasting trade, therefore, which relieves the enemy from the pressure of the war, is not allowed. The colonial trade also, is prohibited, upon the principle, whether just or not, that no trade is lawful in war, which is not permitted in peace. Contraband is the next case defined, and this ought not to be carried beyond its present extent, which is confined to articles in their nature warlike, or to such, as become contraband from their being destined to a besieged place, or to a port of naval equipment.

The articles, in the present case, were not in their nature contraband, nor was there any thing illegal in a neutral's carrying provisions to the British fleet in *Lisbon*, or elsewhere not on our coast. This does not resemble the case of destination to a known port of naval equipment. It is admitted, that the neutral might lawfully transport provisions to *Lisbon* or *Bilboa* for the supply of the inhabitants. Suppose then, that the master is directed to deliver his cargo to the commissary of an army there. It is the army of *Spain*, our friend. There can be no unneutral conduct towards us in carrying provisions to an army of our enemy employed in defending a country, with which we are in amity. The case might be different, if supplies were brought to an army hovering on our coast, or a navy blockading our harbours.

No case has been, and none, it is believed, can be produced, in which neutral property has been confiscated under circumstances like the present. As to the argument, that the British army were aided, and thus the enemy enabled to employ a larger portion of his force against us, it is too remote to justify any conclusion from it, on the subject before the Court.

STORY, J. (after stating the facts.) The general rule, that the neutral carrier of enemy's property is entitled to his freight, is now too firmly established, to admit of discussion. But to this rule there are many exceptions. If the neutral be guilty of fraudulent or unneutral conduct, or have interposed himself to assist the enemy in carrying on the war, he is justly deemed to have forfeited his title to freight. Hence the carrying of contraband goods to the enemy, the engaging in the coasting or colonial trade of the enemy, the spoliation of papers, and the fraudulent suppression of an enemy's interest, have been held to affect the neutral with the forfeiture of freight. And in cases of a more flagrant character, such as carrying despatches, or military passengers, for the enemy, or an engagement in the transport service of the enemy, or a breach of blockade, the penalty of confiscation of the vessel has been also inflicted.²

By the modern law of nations, provisions are not, in general, deemed contraband; but they may become so, when the property of a neutral, on account of the particular situation of the war, or on account of their destination.³ If destined for the ordinary use of life in the enemy's country,

² *Bynk. Q. P. Jur. ch. 14.*—*The Sarah Christina*, 1 Rob. 237.—*The Haase*, 1 Rob. 286.—*The Emanuel*, 1 Rob. 296.—*The Immanuel*, 2 Rob. 186.—*The Atlas*, 3 Rob. 299.—*The Rising Sun*, 2 Rob. 104.—*The Madonna del Burso*, 4 Rob. 169.—*The Neutralitat*, 3 Rob. 295.—*The Welvaart*, 2 Rob. 128.—*The Friendship*, 6 Rob. 420.

³ *The Jonge Margaretha*, 1 Rob. 189.

they are not, in general, contraband; but it is otherwise, if destined for military use. Hence, if destined for the army or navy of the enemy, or for his ports of naval or military equipment, they are deemed contraband.⁴

Another exception from being treated as contraband, is when the provisions are the growth of the neutral exporting country. But if they be the growth of the enemy's country, and more especially if the property of his subjects, and destined for the enemy's use, there does not seem any good reason for the exemption; for, as Sir *William Scott* observes, in such case, the party has not only gone out of his way for the supply of the enemy, but he has assisted him by taking off his surplus commodities.⁵

But it is argued, that the doctrine of contraband cannot apply to the present case, because the destination was to a neutral country. And it is certainly true, that goods destined for the use of a neutral country can never be deemed contraband, whatever may be their character, or however well adapted to warlike purposes. But if such goods are destined for the direct and avowed use of the enemy's army or navy, I should be glad to see an authority, which countenances their exemption from forfeiture, when the property of a neutral. Suppose a British fleet were now lying in a neutral port, would it be lawful for a neutral to carry provisions or munitions of war there, avowedly for the exclusive supply of such fleet? Would it not be a direct interposition in the war, and an essential aid to the enemy in his hostile preparations? In such a case, I should imagine the goods, if the property of a neutral, had the taint of contraband, in its most offensive character, on account of their destination, and that the mere interposition of a neutral port would not protect them from forfeiture.

⁴ *The Jonge Margaretha*, 1 Rob. 189.

⁵ *The Jonge Margaretha*.

I agree, however, that strictly speaking this is not a question of contraband, for that can arise only when the property belongs to a neutral, and here the property belonged to an enemy, and therefore was liable, at all events, to condemnation. But was the voyage lawful, and such as the neutral could, with good faith, and without a forfeiture of his character, engage in? It has been solemnly adjudged, that being engaged in the transport service of the enemy, or in the conveyance of military personages in his employ, are acts of hostility, which subject the property to confiscation.* And the carrying of despatches, from the colony to the mother country of the enemy, has subjected the party to the like penalty.⁷ And in these cases, the fact, that the voyage was to a neutral port, was not thought to change the character of the transaction. The principle of these determinations was asserted to be, that the party must be deemed to place himself in the service of the hostile state, and assist in warding off the pressure of the war, or in favouring its offensive projects.

Now I cannot distinguish these cases, in principle, from that before the Court. Here is a cargo of provisions exported from the enemy's country with the avowed purpose of supplying the army of the enemy. Without this destination, they would not have been permitted to be exported at all. Can a more important or essential service be performed in his favour? In what does it differ from the case of a transport in his service? The property nominally belongs to individuals, and is freighted apparently on private account, but in reality for public use, and under a public contract, implied from the very permission of exportation.

* *The Friendship*, 6 Rob. 420.—*The Orozembo*, 6 Rob. 430.—*The Carolina*, 4 Rob. 338.

⁷ *The Atalanta*, 6 Rob. 440.—*The Constantia*, 6 Rob. 461.—*Note*.

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It is in vain to contend, that the direct effect of this voyage was not to aid British hostilities against the *United States*. It might enable the enemy indirectly to operate with more vigour and promptitude against us, and increase his disposable force. But it is not the effect of the particular transaction, that the law regards. It is the general tendency of such transactions to assist the military operations of the enemy, and the temptation which it presents to deviate from a strict neutrality. Nor do I perceive how the destination to a neutral port can vary the application of the rule. It is only doing that indirectly, which is prohibited in a direct course. Would it be contended, that a neutral might lawfully transport provisions for the British fleet and army, while they lay at *Bourdeaux*, preparing for an expedition to the *United States*? Would it be contended, that he might lawfully supply a British fleet stationed on our coasts? I presume, that two opinions could not be entertained on such questions; and yet, though the cases put are strong, I do not know, that the assistance is more material, than may be supplied under cover of neutral destinations like the present.

On the whole, I am of opinion, that the voyage, in which this vessel was engaged, was illicit, and inconsistent with the duties of neutrality; and I think it is a very lenient administration of justice, to deny the neutral master his freight.

The decree of the District Court is reversed, so far as it allows the freight; and as to the residue is affirmed.*

* Affirmed in the Supreme Court, 1 *Wheaton's Rep.* 382.

THE SAN JOSE INDIANO AND CARGO, FELIS, MASTER.

A ship is deemed to belong to the country, where the owners reside.

If a ship carry the Portuguese flag, but the owners reside in *England*, she is condemnable as prize of war.

Courts of prize look to the *legal interest* in the ship, and will not recognise neutral *equitable* interests.

The property of a person may acquire a hostile character, although his residence be neutral. Therefore, where a person is engaged in the ordinary or extraordinary commerce of an enemy's country, upon the same footing, and with the same advantages as native resident subjects, his property employed in such trade is deemed incorporated into the general commerce of that country, and subject to confiscation, be his residence where it may.

If there be a house of trade established in the enemy's country, the property of all the partners in the house is condemnable as prize, notwithstanding some of them have a neutral residence. But such connexion will not affect the other separate property of the partners having a neutral residence.

If such house ship goods, on *their own account*, to one of the partners, who is domiciled in a neutral country, it is liable as prize; but it is otherwise, if the shipment be made by the order of the partner, on *his separate account and risk*, and not on joint account.

If a person domiciled in the enemy's country be a partner in a house of trade established in a neutral country, and ship goods to them upon their joint account and risk, and not on his separate account, the goods are not liable to condemnation. But it is otherwise, if shipped for his separate account.

In general, the residence of a stationed agent in an enemy's country will not affect the trade of the neutral principal with a hostile character. But this is true only, as to the ordinary trade of a neutral, as such, carried on in the ordinary manner; for if such trade is carried on, not on the footing of a foreign merchant, but as a privileged trader, or by an incorporation with the general commerce of the enemy, in the same manner and with the same benefits, as a native merchant, it is deemed hostile.

Therefore, if a partner in a neutral house be domiciled in the enemy's country, and engaged in its general commerce, *for the benefit of his neutral house*, the property is condemnable as prize.

The doctrine as to stoppage *in transitu* applies only to the case of insolvency, and presupposes, not only that the property of the goods has passed to the consignee, but that the possession is in a third person in transit to the consignee. It cannot apply to a case, where the actual or constructive possession remains in the shipper, or his exclusive agents.

In general, the rules of the prize court, as to the vesting of property, are the same as those at common law.

Where a merchant abroad, in pursuance of orders to purchase goods, sells either his own goods, or purchases goods for his correspondent on *his own credit*, no property

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in the goods vests in his correspondent, until he has done some notorious act to divest himself of his title, or has parted with the possession by an actual and unconditional delivery for the use of such correspondent.

A shipment made by the shipper to his own agent, of the goods so purchased, giving him a right to hold them, until he has made arrangements with his correspondent, does not divest the title or possession of the shipper.

Where a shipment is made to a firm, and the persons who compose it do not appear, farther proof will be required of the names and domicile of the parties.

Where a shipment is made to partners, they are held by the Prize Court to take in equal moieties, unless upon the original papers a different proportion appears.

Where a shipment is made in an enemy's vessel, in a voyage from an enemy's country, it is presumed to belong to enemies, unless a distinct neutral character be impressed upon it.

The treaty of 1810, between the Portuguese and British governments, did not prevent British merchants, resident in the *Brasils*, from acquiring the neutral character of their domicile.

THIS was a prize cause, coming before this Court on appeal from the District Court of *Maine*. The cargo was claimed by the master in behalf of twenty-six different shippers, including a claim for his own adventure; and the ship was claimed by him, as the property of *Da Costa, Guimaraens and Co. of Liverpool*.

At the opening of the cause, *Pitman*, for the captors, stated, that in the Court below the claimant had been permitted to examine the papers before filing the claim, and he produced the record, from which it appeared, that an objection to this course, made by the captors, was overruled by the court.

[*STORY, J.* This is contrary to the ordinary practice. In general, the claimant must make his claim and affidavit, without being assisted by the papers in shaping them, and if they be found substantially to agree with the documents, he will afterwards be permitted to correct any formal errors from the documents themselves. But in special cases, where a proper ground is laid by affidavits,

an order will be made for an examination of such papers, as are necessary to a party to make a proper specification of his own claim, but not for a general examination of all the ship's papers.]

As the several claims, with the facts relating to them, are distinctly considered in the opinion of the Court, it will be unnecessary here to detail the circumstances of each shipment. It will be sufficient to observe, that the claimants were either Portuguese or British subjects, residing, some in *Brazil*, and others in *England*, and for the most part members of commercial houses, having establishments, or resident partners, in both the countries. The cases divided themselves into three classes ;

1. Where there were houses in both the countries constituted by the same persons.

2. Where there were houses in both the countries, but the partners not all the same.

3. Where there was no house in the belligerent country, but a partner residing there for the purpose of transacting business.

The questions of law discussed in the argument were, either as to the neutral or hostile character of the property, considered in relation to the residence and commercial connexions of the owner ; or they concerned the right of property, whether it remained in the belligerent shipper, or had vested in the neutral claimant, at the time of the capture ?

In regard to the first, *Pitman* for the captors made two points ;

1. That where a partner of a house in an enemy's country resides in a neutral country, and there carries on the trade of the house, the character of the *traffic* will make

the property hostile, notwithstanding the personal residence.¹

2. That British subjects, resident in the *Portuguese* dominions, were considered in *England* to retain their British character, and were therefore excepted from the general principles of prize law, as to commercial residence.²

Upon these grounds, the captors sought condemnation of the whole of the property belonging to British subjects, wherever resident, and of all that belonging to Portuguese subjects, who resided in *Great Britain*.

¹ 1 Rob. 14, 15, *The Vigilantia*.—4 Rob. 230, *The Herman*.—3 Rob. 41, *The Portland*.—5 Rob. 302, *The Jonge Classina*.—4 Rob. 235, *The Dree Gebroeders*.—4 Rob. 118, *The Anna Catarina*.

² 4 Rob. 61, *The Henrick and Maria*.—1 Rob. 142, *The Flad-Oyen*.—*The treaty of amity, &c. between his B. M. and the P. R. of Portugal, made at Rio, 19 Feb. 1810; article 10.**

* The material part of that article is as follows :—" His Royal Highness the Prince Regent of *Portugal*, desiring to protect and facilitate the commerce of the subjects of *Great Britain* within his dominions, as well as their relations of intercourse with his own subjects, is pleased to grant to them the privilege of nominating, and having, special magistrates to act for them, as Judges Conservators in those ports and cities of his dominions, in which tribunals and courts of justice are or may hereafter be established. These judges shall try and decide all causes brought before them by British subjects, in the same manner as formerly, and their authority and determinations shall be respected; and the laws, decrees, and customs of *Portugal*, respecting the jurisdiction of the Judge Conservator are declared to be recognised and renewed in the present treaty. They shall be chosen by the plurality of British subjects residing in, or trading at, the port or place, where the jurisdiction of the Judge Conservator is to be established; and the choice so made shall be transmitted to his Britannic Majesty's ambassador, or minister resident at the court of *Portugal*, to be by him laid before his Royal Highness the Prince Regent of *Portugal*, in order to obtain his Royal Highness's consent and confirmation, in case of not obtaining which, the parties are to proceed to a new election, until the royal approbation of the Prince Regent be obtained."—The residue of the article provides for the removal of the Judge Conservator by application through the ambassador or minister; and also contains some stipulations in return on the part of his Britannic Majesty.

W. Sullivan, for the claimants. The captors rest their claim of condemnation upon two grounds :

1. That, though residing in a neutral country, the claimants enjoy there such privileges, as can only belong to British subjects.

2. That they are concerned in houses of trade in the enemy's country.

As to the residence, it is contended, that an Englishman resident in a neutral country is neutral.³

Do the circumstances, under which they reside in the Portuguese dominions, prevent the application of the general principle in the present instance ? The 19th article of the treaty, which is relied on for this purpose, cannot have this effect. It provides for nothing more, than the establishment of a tribunal, similar to the consular courts, which exist throughout the world. It is a mere commercial concession, for which the British government gives an equivalent by the treaty. The judge is a Portuguese, chosen by the British subjects, but confirmed by the *Prince Regent of Portugal*. A British subject so situated might commit treason against the Portuguese government.⁴

Does the connexion with a house of trade in *England* take away the neutral character ? The principle of neutrality derived from residence being once established, it follows, that a British subject so resident may carry on trade with his native country. He may ship, and receive returns, and his goods, in going and coming, will be protected from capture. He may do whatever any other neutral may do. If then he may carry on the trade, how is the case varied, if he choose to connect himself with others in the enemy's country ? It cannot deprive him of his neutral

³ 3 Rob. 12, *The Indian Chief*.—1 Rob. 296, *The Emanuel*.—3 Bos. and Pull. 113, *McConnelle vs. Hector*.

⁴ *Chitty L. of N.* 41 to 46.—*Ibid.* 37.

character. If he and his partner ship their joint property on the ocean, the belligerent may seize and bring it in ; he may make prize of the hostile part and restore the neutral. The belligerent therefore suffers nothing.⁵

The cases cited on the other side do not shew, that connexion in a house of trade will make the whole property good prize. The case of *Ostermeyer* amounts to no more, than that his adventure began and was to end at *Ostend*.

The principle is, that an association with a house of trade, established in the enemy's country, does not subject neutral property to condemnation, nor take away the neutral character, if the trade be such, as might have been carried on by the neutral on his own account.⁶

Prescott, on the same side. There are two commercial houses, *Dyson Brothers and Co.* in *England*, and *Dyson Brothers and Finney* in *Rio*, both being composed of the same partners. The property captured was on its way from the house in the enemy's country to that in the neutral country, and it is contended ;

1. That the part belonging to the partners domiciled in the neutral country is not subject to confiscation.

The laws of nations authorize the belligerent to abridge the rights of the neutral, so far only as may be necessary for his own protection. The law of contraband is governed entirely by this principle.

In peace, the neutral has a right to carry on trade with another country, either by shipments and returns, or by establishing houses in the two countries consisting of the citizens of each. If this right may be taken away in war, it can only be because it is injurious to the belligerent. It is true, that by such commerce one of the

⁵ 6 Rob. 127, *The Franklin*.—4 Rob. 223, *The Herman*.

⁶ 1 Rob. 1, *The Vigilantia*.

belligerents may be enriched, but this circumstance alone cannot give the opposite party a right to interfere. To a certain degree the enemy is benefited by all commerce carried on with him by other nations; yet the commerce is not therefore illegal. It will not be denied, that the neutral may have an agent in the enemy's country, and however intimate the trade, it is not to be intercepted. Why then should the belligerent have a right to interfere, when there are two houses? What reason is there for saying to the neutral, "you may carry on a direct trade, and send your ships backwards and forwards, as much as you will, but you shall not have any association with merchants there?"

If the doctrine contended for on the part of the captors were well founded, it would be necessary, on the breaking out of war, to dissolve all partnerships existing between the citizens of either of the belligerent powers, and those of other countries. The neutral partners must abandon their commercial connexions and return home, and those remaining in the belligerent country must find new employment, distinct from that of their partners. There is no authority to countenance a doctrine so extensively mischievous. None of the cases alluded to will embrace the present. They are all cases of persons, who, having a commercial house in the hostile country, and being citizens of that country, abandon it after or shortly before the war, and continue to employ their capital in adventures, which terminate in the enemy's country, where the house is still kept up. In most of the cases under consideration, there is a house of trade in the neutral country, and a partner resident in the enemy's country, and the enemy is not profited by the trade more than the neutral. The case would not be different, if the neutral traded directly with the enemy's country without any partner there. It is true, that the national character may be affected by the traffic, as

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well as by the residence. Such is the case of the Dutch fishing vessel.⁷ But this is very different from the case of a house having one of its partners in a neutral country and the other in that of the enemy, and still more unlike the case of two houses of trade, one in each of the countries.

In *Ostermeyer's* ⁸ case, Sir *W. Scott's* difficulty arose from a suspicion, that *Ostermeyer* had a sole house of trade in *Ostend*, and perhaps also, from his having been engaged with a partner in that place. That case is very far from supporting the principle contended for here. In *Rudolf's* case,⁹ the property appearing to be shipped on the account of *Rudolf*, who resided and carried on a separate business at *Emden*, the trade was considered legal, though he was at the same time a partner in a house in *London*, to which the property was shipped from the enemy's country.

STORY, J. How do you distinguish between the case, where a man has one house in the enemy's country, and another in a neutral country, in the latter of which he resides, and the case, where there are a hostile and a neutral house composed of two partners, one residing in each country?

Prescott. Sir *W. Scott* has not put the case of a person having a house in the neutral country. They are however distinguishable. When there is but one man, one house must be subsidiary to the other, and the belligerent would be defrauded by the neutral's covering the whole by means of his residence. But in the case of two partners, both may be principal houses, and in that case one half is liable to condemnation. The cases of the *St. Eustatius* house,

⁷ 1 Rob. 11, *The Vigilantia*.

⁸ 3 Rob. 41, *The Portland*.

⁹ 4 Rob. 230, *The Herman*.

and of the emigrants from *Newtucket*, cited 1 Rob. 14, are directly in point for the claimants.

2. It is contended, that the provisions of the tenth article of the treaty of 1810 have no effect to 'make this case an exception from the general rule as to national character.

The general rule I have ever supposed to be, that all persons resident in the territory partake the character of the sovereign. Peace with him is peace; with all, who are under his government. It cannot be conceived, that persons, living under the jurisdiction of the same sovereign, should have different rights as to foreign powers; that some should be at peace, while others are at war.

The treaty does no more, than to revive certain commercial privileges, which had anciently subsisted between *England* and *Portugal*. The Judge Conservator is always to be a native Portuguese; and in fact his tribunal differs not essentially from the consular courts. The authority of the judge emanates from the sovereign of *Portugal*, and that sovereign must enforce the judgment. There is no reason, why an Englishman should not be as much domiciled in *Portugal*, as a Jew in *England*.

The rule, as to persons resident in factories, does not apply to this case. The rule itself has never been extended farther than to factories established in the dominions of the Asiatic powers.

If the doctrine contended for were true, it would follow, that if we were at war with *Portugal*, and at peace with *Great Britain*, the property of British subjects resident in *Portugal* would be protected from capture. And, on the other hand, what would there now be to restrain an American cruiser from entering a Portuguese harbour and taking out British ships? Upon this principle, the territory would not be neutral. There would be at best a divided empire,

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and: we should be at this moment at war with many of the subjects of *Portugal*.

Dexter, in reply. The question is simply as to the commercial character of the claimants. It is personal, and does not relate to the branch of trade they are engaged in. And, though it is necessary to consider this question in two points of view, viz. how far the commercial character is affected by the trade, and how far by the treaty, still these must be put together, to determine the national character.

1. Though it be true, that a neutral may carry on commerce, in time of war, with our enemy's country, yet he cannot carry it on in that country. In the *Vigilantia*¹⁰ two cases are cited, in which the part belonging to a partner resident in a neutral country was restored. Sir *W. Scott* says, that from these it had been supposed, that the character was determined from residence alone, but it was otherwise ruled in a case before the Lords of Appeal, and held, that such restitution was confined to cases happening at the commencement of a war. The principle established by the case of the *Vigilantia* is, that trade, carried on in a belligerent country by one resident in a neutral country, is subject to confiscation, if he does not withdraw his trade after reasonable notice of the war. How is trade to be carried on then, he being absent? The strongest case, perhaps, is that of a house of trade in the belligerent country, in which a neutral is a partner. But the principle extends yet farther, and embraces a case, where there is no house established in the enemy's country, but the trade is carried on by an agent residing there. What is done by the partner or agent is done by the

¹⁰ 1 Rob. 14.

neutral himself. It is by no means necessary, that a man should have a counting-house in any place, in order to make him a merchant of that place."

The case of *Ostermeyer* also confirms this view of the prize law. It was thought, that if he was still a secret partner in the house in *Ostend*, or if, though a neutral, he was carrying on trade by an agent in *Ostend*, he was, as to such trade, an enemy, and his property engaged in it was liable to capture. He is called upon for farther proof, both as to sole and joint trade, and the inference is, that either of these would be sufficient to subject his property to confiscation.

There can be no difference between a trade carried on from *Great Britain* to *Rio Janeiro*, and from *Great Britain* to *France* or any other country. The residence of the claimant in *Rio* can make no difference whatever, as to his rights in this respect. But how far is this to be considered, in reason, as a trade carried on to *Rio*?—It is not denied, that if half of the owners are in *England*, and half in *Rio*, one half of the property is to be condemned. The remaining half cannot be considered as exclusively the trade of *Rio*. It is equally the trade of *Great Britain*, and there would be, as to this half, at least as much reason to condemn as to acquit. Here the distinction is to be attended to. The neutral has not engaged in trade with the enemy, but in the enemy's country. With regard to enterprises originating in *Great Britain*, he is, according to the decision in the *Jonge Classina*, to be considered a British merchant, and with regard to those originating in *Rio*, as a Portuguese merchant. Now this voyage originates in *Great Britain*. The distinction is a reasonable one. The whole trade cannot be considered as neutral, and part being transacted in *England*, part in *Rio*, there

¹¹ 5 Rob. 270, *Jonge Classina*.

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is no better rule, than to adjudge that portion hostile, which originates in *Great Britain*, and the other neutral.

STORY, J. If there were nothing in the papers to shew where the voyage began, is the property then to be considered hostile?

Dexter. It might depend on the fact, when and by whom it was purchased and laden.

2. Not only are the claimants resident in a neutral country, and carrying on trade in the enemy's country, but in most of the cases, they are native subjects of *Great Britain*, residing in the Portuguese dominions, without intention of mixing with the people of that country, and permitted by treaty to remain there without such mixture. Is their domicile changed by a residence under such circumstances? There must be an *animus manendi*, to constitute domicile. This is *Vattel's* definition. The domicile is not changed, until the man not only resides in the country, but becomes a member of the civil community.

The treaty between *Great Britain* and *Portugal* provides, that the subjects of the former resident in the dominions of the latter may choose a judge. It must be intended, that he should judge according to the English laws. Did the sovereign of *Portugal* mean to admit, that his own courts were corrupt? This is hardly to be supposed. The only probable account of the article is, that the Portuguese courts not understanding the English laws, the Prince Regent was willing, that a court should be formed, in which the British should enjoy their own laws. They were thus separated and distinguished from his own subjects, as to all commercial purposes, and therefore the principal reason is here wanting, which in ordinary cases makes the domicile and the national character to follow the residence.

We have no reason to apprehend from this doctrine the extravagant effects, which have been attributed to it. A third nation would not be bound to acknowledge the British residents in *Portugal*, as retaining their British character. There would not therefore be the *imperium in imperio* supposed on the other side.

Sir *W. Scott* has, in several instances, spoken of British subjects so situated, as continuing to be British. In the *Indian Chief* we have the reason given, why the residents in factories are still considered citizens of the country, to which the establishment may belong. It is, that they cannot mix with the natives. In the present case, the sovereigns of both countries have entered into an agreement, that their subjects shall not mix. This compact of the two sovereigns is certainly equivalent to the prohibition of one. The case is analogous to that of the establishments in the *East Indies*.

Argument upon the questions of proprietary interest.

In several of the claims, the manner of the shipment gave rise to questions, as to the proprietary interest at the time of the capture. Before introducing the argument, it will be necessary to state briefly the circumstances of the two principal claims.

Claim of J. Lizaur. In this case the bill of lading expressed the property to be shipped by *Dyson Brothers and Co.*, consigned to *Dyson Brothers and Finney*, but contained no account and risk. The invoice declared the goods to be consigned to *Dyson Brothers and Finney*, "by order and for account of *J. Lizaur*." From a letter it appeared, that the purchase was made by order of the claimant, and exceeded the amount of funds in the shippers' hands; that they debited him the amount of the invoice, including freight, commissions, &c. at six months credit; and the consignees are directed to do as they think proper.

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Claim of J. M. Pinto. The bill of lading and invoice were similar to the last. A letter informed *Dysons* and *Finney*, that they were debited the amount of the goods ordered by them for *Pinto*, and enclosed a bill of exchange for the same sum on *Pinto* to order of *Dysons* and *Finney*, "which they would use or not, as they pleased."

Pitman, for the captors. The property had not vested in the claimants. When the delivery depends upon a condition to be performed, the property of the shipper is not devoted until performance of the condition.¹²

Sullivan, for the claimants, cited as to change of property, 1 *Rob.* 336.—4 *Rob.* 113, note.—2 *Com. on Contracts*, 210, where the cases on the subject of sales are collected.

STORY, J. stated briefly the facts and points adjudged in several cases, which had recently been determined in the Supreme Court of the *United States*, viz. *The Frances*—*French's claim*;¹³ the claim of *W. and J. Wilkins*; and the claim of *Kimmell* and *Albert*.

Prescott, for the claimants. The cases of *Lisaur* and *Pinto* very much resemble that of *Wilkins*, decided in the Supreme Court, in favour of the claimant. Here was an order from *Lisaur* to purchase and ship merchandise for his account, and he made a remittance in payment. The order, it is true, exceeded the amount of funds, but there was an agreement on *Lisaur's* part to purchase the goods, and that the funds should be applied towards the payment. *Dyson Brothers* and *Co.* accordingly purchased and shipped on account of *Lisaur*. The goods were at his risk

¹² 6 *Rob.* 327, *The Constantia*.

¹³ 8 *Cranch*, 350.

from that time, and indeed from the time of the purchase, if the purchase for his use could be proved. Had the warehouse of the shippers, after such purchase, been consumed by fire, the loss of the goods would have been *Lisaur's*. The difficulty arises from the manner of the consignment. The goods are shipped to *Dyson Brothers* and *Finney*, in order to give a right of *stoppage in transitu*, or at least to preserve the shipper's *lien* on the goods. There was a right to retain until the money was paid. *Lisaur*, after tendering the price, might have recovered the goods, and *Dyson Brothers* and *Co.* might have brought an action for the money and recovered it of *Lisaur*. As the goods had been purchased by his order, he could not have defended himself upon the ground that the goods had not been delivered. A general rule for ascertaining whether the property has vested, is to ascertain whether any thing remains to be done by the vender. If a bargain be made, and before delivery the thing is destroyed, it is settled, that if nothing farther was to be done by the vender, the buyer must sustain the loss.¹¹ The same doctrine is to be found in *Pothier*.

Pinto's case is even stronger than *Lisaur's*. The goods were purchased in compliance with an order given to the house in *Rio*. They were shipped for account and risk of *Pinto*, and a bill of exchange drawn on him for their value. They were sent to the house in *Rio*, that they might deliver them to *Pinto*, and procure his acceptance of the bill.

Dexter, in reply. The questions before the Court are not now to be settled by the authority of English books. They have received a direct determination in our own Su-

¹¹ 11 *East*, R. 210, *Rugg vs. Minet*.

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preme Court. The broadest principle established in favour of the neutral is, that the property shall vest, when it appears to have been delivered to the captain as his agent, being shipped in pursuance of orders, or when, instead of an absolute consignment, such papers are sent to the claimant, as will enable him to obtain possession of the property.

The cases of *Lisaur* and *Pinto* differ, but in neither of them is there a delivery to the claimant or his agent. On the contrary, they are to be delivered to the shippers themselves. In the case of *Pinto*, there was to be no sale, unless the house should be satisfied of his credit.

STORY, J. This is a case of a Portuguese ship, with a very valuable cargo on board, bound on a voyage from *Liverpool* to *Rio de Janeiro* in the *Brasils*, and captured on the 16th day of May last, by the private armed ship *Yankee*, and carried into *Portland*, in the District of *Maine*, for adjudication. Various claims were interposed by the master for himself and others, as owners of the ship or of some portions of the cargo, in the District Court of *Maine*, and from the sentence of that court an appeal has been taken to this Court. It will be necessary to give these several claims a distinct consideration.

Claim of *Costa Guimaraens*, and *Co.* for the ship.

The ship is claimed by the master, as the property of the house of Messrs. *Costa Guimaraens*, and *Co.* of *Liverpool*. The claim alleges, that the house consists of four persons, viz. *Antonio Julico Da Costa* and *Manuel Rilairo Guimaraens*, who are Portuguese subjects domiciled in *England*, and *Carlos Lucena Mendes* and *Joao Gaudentio Da Costa*, who are Portuguese subjects domiciled at *Maranhão* in *Brazil*. The master, in his answer to the stand-

ing interrogatories, declares the owners to be Messrs. *Da Costa* and *Guimaraens*, who, he alleges, are partners in trade, and produces a copy of a bill of sale, by which the legal property of the ship is vested in *Guimaraens* alone. It is unnecessary to consider the effect of this contrariety between the answer of the master and the asserted claim; though, for myself, I am free to declare, that it will be extremely difficult to maintain that his regular answers can ever be outweighed by any subsequent declarations, after the pressure of the case is fully known, and counsel has been taken. It is clear, that the legal title of the ship can be asserted in the Prize Court, as to those persons only to whom a bill of sale regularly conveys it. Whatever equitable interests may exist in other persons is immaterial; the Court looks singly to the bill of sale, as a document, which is recognised by the law of nations, and the ownership must be decided by it. It is, as Sir *William Scott* observes, the universal instrument of transfer of ships in the usage of all maritime countries, and in no degree a peculiar title deed or conveyance, known only to the law of England.¹⁵ The ownership therefore in this case must be deemed to be in Mr. *Guimaraens*, and, as he is domiciled in the enemy's country, it must be condemned as enemy's property.¹⁶

The next claim is that of Messrs. *Dyson Brothers* and *Finney*, of *Rio de Janeiro*.

The goods in this claim were shipped by Messrs. *Dyson Brothers* and Co. of *Liverpool*, by order, for account of, and consigned to, Messrs. *Dyson Brothers* and *Finney*, of *Rio de Janeiro*. From the letters and accompanying documents it appears, that the houses at *Rio* and at

¹⁵ *The Sisters*, 5 Rob. 166.

¹⁶ *The Vigilantia*, 1 Rob. 1.

Liverpool are composed of the same persons, who are all native subjects of *Great Britain*, viz. *James Finney* domiciled at *Bio*, *Thomas F. Dyson* at *Liverpool*, and — *Dyson*, at *Halifax*, in *England*.

Upon these facts, respecting which there is no controversy, the captors claim condemnation of two thirds of the shipment, as the property of British subjects domiciled in *England*, and, as to this property, there is no doubt that condemnation must follow. As to the other third, which constitutes the share of *James Finney*, the captors contend, that it is liable to condemnation on two grounds:—1st. As the property of a person connected in a house of trade in the enemy's country, and continuing that connexion after and during the war, the property having been purchased and shipped on the account and risk of the same house. 2d. Because under the Portuguese treaty of 1810 with *Great Britain*, British subjects domiciled in the dominions of *Portugal* are deemed, for commercial purposes, as retaining their British, and consequently, in the present case, their hostile, character. As each of these questions is applicable to several of the claims before the Court, I will give each of them a distinct examination.

And as to the first point, it is very clear that, in general, the national character of a person is to be decided by that of his domicil; if that be neutral, he acquires the neutral character; if otherwise, he is affected with the enemy's character. But the property of a person may acquire a hostile character, altogether independent of his own peculiar character derived from residence. In other words, the origin of the property, or the traffic, in which it is engaged, may stamp it with a hostile taint, although the owner may happen to be a neutral domiciled in a neutral country. Such are the familiar instances of engagements in the colonial, coasting, fishing, or other privileged trade of the ene-

my." So the produce of an estate belonging to a neutral, in an enemy's colony, is impressed with the character of the soil notwithstanding a neutral residence." So if a vessel, purchased in the enemy's country, is, by constant and habitual occupation, continually employed in the trade of that country during the war, she is deemed a vessel of the country from which she is so navigating, whatever may be the domicile of the owner." The principle to be extracted from these cases seems to be, that where a person is engaged in the ordinary or extraordinary commerce of an enemy's country upon the same footing and with the same advantages as native resident subjects, his property, so employed, is to be deemed incorporated into the general commerce of that country, and subject to confiscation, be his residence where it may. And the principle seems founded in reason. Such a trade, so carried on, has a direct and immediate effect in aiding the resources and revenue of the enemy, and in warding off the pressure of the war. It is not distinguishable from the ordinary trade of his native subjects. It subserves his manufactures and industry; and its whole profits accumulate and circulate in his dominions, and become regular objects of taxation, in the same manner as if the trade were pursued by native subjects. There is no reason, therefore, why he, who thus enjoys the protection and benefits of the enemy's country, should not, in reference to such a trade, share its dangers and its losses. It would be too much to hold him entitled, by a mere net-

¹⁷ *The Vigilantia*, 1 Rob. 1.—*The Susa*, 2 Rob. 251.—*The Princess*, 2 Rob. 49.—*The Anna Catharina*, 4 Rob. 107.—*The Rendsborg*, 4 Rob. 121.—*Borens vs. Rucker*, 1 Bl. Rep. 313. *The Immanuel*, 2 Rob. 186.—4 Rob. Appendix A.—*The Maria*, 5 Rob. 385.—*The Vrouw Anna Catharina*, 5 Rob. 161.—*Freundschaft*, 4 Rob. 166.

¹⁸ *The Phoenix*, 5 Rob. 20.—*The Dree Gebroeders*, 4 Rob. 232.

¹⁹ *The Vigilantia*, 1 Rob. 1.—*The Jonge Emilia*, in the *Portland*, 3 Rob. 41—52.

tral residence, to carry on a substantially hostile commerce, and, at the same time, possess all the advantages of a neutral character. I agree, therefore, "that it is a doctrine, supported by strong principles of equity and propriety, that there is a traffic, which stamps a national character on the individual, independent of that character, which mere personal residence may give him." And I think the case now before the Court comes clearly within the range of the principle, which I have already stated. Here is a house of trade, composed entirely of British subjects, established in the enemy's country, and habitually and continually carrying on its trade, with all the advantages and protection of British subjects. It is true one partner is domiciled in the neutral country; but for what purposes? For aught that appears, for purposes exclusively connected with the *Liverpool* establishment. At all events, the whole property embarked in its commercial enterprises centres in that house, and receives its exclusive management and direction from it. Under such circumstances, the house is as purely British in its domicile (if I may use the expression) and in its commerce, as it could be, if all the partners resided in the British empire. If the case, therefore, were new, I do not at present perceive, how it could be extracted from the grasp of confiscation, from its thorough incorporation into the enemy's character.

But, how stands the case upon the footing of authority? It is argued, that no decision comes up to the point, and that the Court is called upon, by the captors, to promulgate a novel doctrine. If, however, I am not greatly deceived, it will be found, on an attentive examination, that there is a strong current of authority all setting one way. From the cases of the *Jacobus Johannes* and the *Osprey*,²⁰ an erro-

²⁰ 1 Rob. 14.

neous notion had been adopted, that the domicil of the parties was that alone, to which the Court had a right to resort in prize causes. But, in the case of *Coopman*,²¹ those cases were put upon their true foundation, as cases merely *at the commencement of a war*, in reference to persons, who, during peace, had habitually carried on trade in the enemy's country, though not resident there, and, therefore, entitled to have time to withdraw from that commerce. But the Lords of appeal, in that case, expressly laid it down, that if a person entered into a house of trade in the enemy's country in time of war, or *continued that connexion during the war*, he should not protect himself by mere residence in a neutral country. Now, I am utterly at a loss to know, how terms more appropriate could be employed to embrace the present case, which is that of a connexion in a house of trade in the enemy's country, *continued during the war*. This doctrine, held by the highest authority known in the prize law, has been repeatedly recognised and enforced by the same learned court.²² In the cases of the *Portland*, &c.²³ the very exception was taken, as to Mr. *Ostermeyer*, who, though domiciled at *Blankanese*, was alleged to be engaged in the trade of *Ostend*, either as a partner, or as a sole trader. In those cases, the general principle was explicitly admitted, and one vessel (the *Jonge Emilia*) eventually condemned on that ground. It is a mistake of the learned counsel for the claimant, that the court, in those cases, confined the farther proof to the fact, whether Mr. *Ostermeyer* was a sole trader at *Ostend*; it will appear on a careful examination, that farther proof was also required as to the alleged part-

²¹ *The Nancy*, 1 Rob. 14, 15.

²² Vide in the *Susa*, 2 Rob. 255, and the *Indiana*, 3 Rob. 44.

²³ 3 Rob. 41.

nership, and particularly as to a letter in the *Fran Louisa*, pointing to that partnership. In the *Jonge Classina*,²⁴ which was a very strong case of its rigid application, Sir *W. Scott* avows the same doctrine, and declares, that a man may have commercial concerns in two countries; and if he acts as a merchant of both, he must be liable to be considered as a subject of both, with regard to the transactions originating respectively in those countries. The case of the *Herman*,²⁵ so far from impugning the principle, evidently proceeds upon the admission of it; and I think it may be affirmed without rashness, that not a single authoritative *dictum* exists, which can shake its force. It has been attempted to distinguish those cases from that before the court, by alleging, that none of them present the fact of a shipment made from a house in the enemy's country to its connected house in the neutral country. But, it does not seem to me, that this difference prevents any solid ground, on which to rest a favourable distinction.

On the whole, I am of opinion, that the shipment, in this case, being made by a house in the enemy's country for their own account, in a voyage originating in that country, must be deemed enemy's property, and that the share of *Mr. Finney* must follow the fate of the shares of his partners.

The captors have further contended, in reference to other claims before the court, that the same principle applies in cases, where a house, in the enemy's country, ships goods to one of its partners domiciled in a neutral country, either in his single name, or to a neutral house there, of which he is also a partner; and *à converso*, where a partner of a neutral house is domiciled in the enemy's

²⁴ 5 Rob. 302.²⁵ 4 Rob. 228.

country, and ships to such house goods the manufactures of that country.

In respect to the two former cases, I agree at once to the position, if the shipment be really made on the account, and for the benefit, of the house in the enemy's country. For, in such case, the neutral partner, or house, acts but as their agent, and the whole property and profits of every enterprise rest in the hostile house. And, indeed, it is wholly immaterial, under such circumstances, to whom the consignment may be, whether to a partner or a stranger.—The property, in its origin, transit and return, is thoroughly imbued with the enemy's character. And the same may be affirmed of the third case, if the partner, so domiciled in the enemy's country, be really engaged in the general commerce of that country, for the exclusive benefit of his neutral house. For although, in general, the residence of a stationed agent in the enemy's country will not affect the trade of the neutral principal with a hostile character, yet this is true only as to the ordinary trade of a neutral as such, carried on in the ordinary manner. But where such trade is carried on, not on the footing of a foreign merchant, but as a privileged trader, or by an incorporation with the general commerce of the enemy in the same manner, and with the same benefits, as a native merchant, it would seem to be embraced in the general doctrine, which I have already stated.²²

But the principles contended for by the captors, as I understand the argument, spread over a wider surface, and extend to cases, where a shipment has originated in a house in the enemy's country, of which such partner is a member, although the shipment be *bona fide*, and exclusively on account and risk of such neutral partner or house. And

²² Vide the *Anna Catharina*, 4 Rob. 107-119.—The *Rendsborg*, 4 Rob. 121-139.—The *Indiana*, 3 Rob. 44.

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the declaration of Sir *William Scott* in the *Jonge Clas-sina*,²⁷ which I have already quoted, is relied on as an authority, which supports the argument. But I do not think, that the language of Sir *William Scott*, correctly considered, admits of this interpretation. He is merely alluding to the origin of transactions, which exclusively regard the interests of a house of trade established in a particular country, and not transactions, where it acts merely as an agent, or shipper, for other persons. To shew this more distinctly, the learned Judge in the *Portland*²⁸ says, "I know of no case, nor of any principle, that could support such a position as this, that a man having a house of trade in the enemy's country, as well as in a neutral country, shall be considered in the whole concerns as an enemy's merchant, as well in those solely, which respect his neutral house, as those, which belonged to his belligerent domicil. The only light, in which it could affect him, would be as furnishing a suggestion, that the partners in the house in one place were also partners in the other." And in the *Herman*,²⁹ where a shipment was actually made from an enemy's port, by order of the neutral house to the belligerent house, but on account of the former, the property was adjudged to be restored.

These cases do, as I think, assign and establish the true and reasonable limits of the doctrine; and I have no difficulty in affirming, that shipments made by an enemy's house, on account and risk, *bona fide* and exclusively, of a neutral partner or house, are not subject to confiscation as prize of war. And the same principle must apply in the converse case of a partner, or agent, domiciled in the enemy's country, and making shipments to his neutral house, or principal, on the exclusive account of the latter.

²⁷ 5 *Rob.* 297—302.²⁸ 3 *Rob.* 41—44.²⁹ 4 *Rob.* 223.

I now come to the consideration of the effect of the Portuguese treaty as to British subjects domiciled in the Portuguese dominions ; a question which, though it may well be spared, as to the claim of Messrs. *Dyson Brothers and Co.*, rides over a large mass of claims, and must eventually decide them. The articles relied on by the captors are the 8th and 10th. The former in substance provides, that British subjects within the Portuguese dominions shall not be restrained by any monopoly, contract, or exclusive privileges of sale or purchase (saving only those of the crown;) but shall have free permission to buy and sell without being obliged to give any preference or favour in consequence of such monopolies, &c. The latter grants to such British subjects the privilege of nominating, subject to the approbation and ratification of the Crown of *Portugal*, judges conservators, who are to try and decide all causes brought before them by British subjects in the same manner as formerly ; and the laws, decrees and customs of *Portugal* respecting the jurisdiction of such judges are declared to be recognized and renewed by the same treaty.

It is contended by the captors, that the privileges granted by these articles completely revive the exclusive British character in British subjects within the dominions of *Portugal*; and the case is likened to that of the factories in the Eastern world, in which the residents have been universally held to take the national character of the establishment itself, under whose protection they carry on their trade.³⁰ It is to be recollected, however, that this is a rule of the law of nations applying peculiarly to those countries, and different from what ordinarily prevails in *Europe* and the western parts of the world ; and is founded on the immiscible character kept up from the earliest times in the East, where foreigners are never incorporated into the ge-

³⁰ *The Indian Chief*, 3 Rob. 22, and the cases there cited.

neral society of the natives. It is indeed asserted by Sir *W. Scott*,²¹ that the subjects of *Great Britain*, resident in *Portugal*, are distinguished by special privileges (the same in effect as secured by the present treaty); that they retain the British character in spite of the *Portuguese domicil*, even in the estimation of the enemy himself (i. e. *France*); and that they exercise an active jurisdiction at least over their own countrymen established in those parts. And in the *Fladoyen*²² he alludes in the same manner to these extraordinary privileges.

This language is exceedingly strong, and, though introduced in a collateral discussion, affords considerable countenance to the argument of the captors. Perhaps the same inclination of opinion may be traced in the *Nayade*.²³ But whatever may be the bearing of this opinion, it seems now settled by the Lords of Appeal, that a British born subject, resident in the English factory at *Lisbon*, so far possesses the Portuguese character, as that his trade with the enemies of his native country is not illegal;²⁴ and from thence I infer, that he must be deemed, as to purposes of trade, as taking the general character of his domicil. Upon the footing of authority therefore the case for the captors is not made out. And upon principle, I think it is as difficult to maintain. The 8th and 10th articles of the treaty secure no more, than the freedom of trade, and the right to have all causes tried by a special tribunal according to the laws and customs of *Portugal*. Still, however, it is an incorporation of British residents into the general commerce of the country. They are still subject to the general laws respecting revenue and taxes; to the general duties of qualified allegiance; and to the general regulations of social and domestic, as well as

²¹ *Henrick and Maria*, 4 Rob. 43, 61. ²² 1 Rob. 135, 142.

²³ 4 Rob. 251. ²⁴ *The Danous*, 1802, 4 Rob. 255. Note.

commercial, intercourse. Far different is this from the case of Eastern factories, where the laws of the factory govern the parties, who claim protection under it, and no general amesnability to the laws of the country is either claimed or exercised. Without going more at large into this topic, I am satisfied, that British residents in the dominions of *Portugal* take the character of their domicil, and as to all third parties are to be deemed Portuguese subjects.

The next is the claim of Mr. *J. Lisaur* of ——— in *Brazil*. The shipment was made by Messrs. *Dyson Brothers and Co.*, and by the bill of lading the goods are consigned to Messrs. *Dyson Brothers and Finney, Rio de Janeiro*. The accompanying invoices express the shipment to be made by order and for account of Mr. *J. Lisaur*, and contain charges of freight, commission and insurance, and an acknowledgment of giving credit for three and six months. In a letter of the 4th of May, 1814, addressed by the shippers to the consignees, they say “for Mr. *Lisaur* we open an account in our books here, and debit him *l.2450 2s. 3d.* amount of 14 bales, at six months credit, and *l.1764 11s. 7d.* for 16 cases of cambrics, &c. at three months credit; we cannot yet ascertain proceeds of his hides, &c. but find his order will far exceed amount of these shipments, therefore consign the whole to you, so as you may come to a proper understanding. We have charged our usual commission of two and a half per cent. in the invoices, but should you have made any stipulation to the contrary, he can again bring same to our debit. Invoices, bills of lading and patterns of what goods are requisite we forward as usual in a small box to your address.”

The single question presented in this claim is, in whom the property vested during its transit; if in Mr. *Lisaur*, then it is to be restored; if in the shippers then it is to be condemned. It is contended in behalf of the claimant, that

the goods, having been purchased by order of Mr. *Lisaur*, the property vested in him immediately by the purchase, and the contract being executed by the sale, no delivery was necessary to perfect the legal title; that nothing was reserved to the shippers, but a mere right of stoppage *in transitu*, and that if they had been burnt before the shipment, or lost during the voyage, the loss must have fallen on Mr. *Lisaur*.

As to the doctrine of stoppage *in transitu*, I do not conceive it can apply to this case. That right exists in the single case of insolvency, and presupposes, not only that the property in the goods has passed to the consignee, but that the possession is in a third person in their transit to the consignee. It cannot therefore touch a case, where the actual or constructive possession still remains in the shipper or his exclusive agents.³⁵

I agree also to the position, that in general the rules of the prize court, as to the vesting of property, are the same as those of the common law, by which the thing sold, after the completion of the contract, is properly at the risk of the purchaser.³⁶ But the question still recurs, when is the contract executed. It is certainly competent for an agent abroad, who purchases in pursuance of orders, to vest the property, immediately on the purchase, in his principal. This is the case, when he purchases on the credit of his principal, or makes an absolute appropriation and designation of the property for his principal. But where a merchant abroad, in pursuance of orders, sells either his own goods, or purchases goods on his own credit, (and thereby in reality becomes the owner) no property in the goods vests in his correspondent, until he has done some notorious act to divest himself of his title, or has parted with the pos-

³⁵ *Abbott*, p. iii. ch. 9.

³⁶ *Feise vs. Wray*, 3 *East*, 93.—*Rugg vs. Minott*, 11. *East*, 210.—*Hanson vs. Meyer*, 6 *East*, 614.—*The Constantia*, 6 *Rob.* 321.—*Kinloch vs. Craig*, 3 *T. R.* 119, 783.

session by an actual and unconditional delivery for the use of such correspondent. Until that time he has in legal contemplation the exclusive property, as well as possession; and it is not a wrongful act for him to convert them to any use, which he pleases. He is at liberty to contract upon any new engagements, or substitute any new conditions, in relation to the shipment. And this I understand not only as the general law, but as the prize law pronounced by that high tribunal, whose decisions I am bound to obey.

In the *Venus* (at February term, 1814)³⁷ on the claim of *Magee* and *Jones*, in delivering the opinion of the Court, Mr. Justice *Washington* observed: "to effect a change of property, as between seller and buyer, it is essential, that there should be a contract of sale agreed to by both parties, and if the thing agreed to be purchased is to be sent by the vendor to the vendee it is necessary to the perfection of the contract, that it should be delivered to the purchaser or to his agent, which the master (of a ship) to many purposes is considered to be." And advertng to the facts of that claim he further says: "The delivery of the goods to the master of the vessel was not for the use of *Magee* and *Jones*, any more than it was for the shipper solely, and consequently it amounted to nothing, so as to divest the property out of the shipper, until *Magee* should elect to take them on joint account, or to act as the agent of *Jones*."

In the present claim before the Court, the delivery to the master was not for the use of Mr. *J. Lisaur*, but for the consignees, who are in fact the shippers. They, therefore retained the constructive possession as well as right of property; and it is apparent from the letter, that the shippers meant to reserve to themselves, and to their agents in relation to the shipment, all those powers, which ownership gives over property. It is material also, in this view, that all the papers respecting the shipment were addressed to

³⁷ Since reported. 8 Cranch, 253.

their own house, and the claimant could have no knowledge or controul of the shipment, unless by the consent of the consignees under future arrangements to be dictated by them. In this view, I cannot distinguish the case from that of Messrs. *Kimmell* and *Albert's* claim in the *Merrimack*, at February term 1814; and it steers wide of the distinction, upon which Messrs. *Wilkins'* claim in the same ship, at the same term, was sustained. The authorities also cited at the argument by the captors are exceedingly strong to the same effect. The *Aurora*² approaches very near to the present case. There the shipment, by the express agreement of the parties, was in reality going for the use and by the order of the purchaser, but consigned to other persons, who were to deliver them, if they were satisfied for the payment. And Sir *W. Scott* there quotes a case, as having been lately decided, where goods sent by a merchant in *Holland* to *A.* a person in *America*, by order of *B.* and for account of *B.* with directions not to deliver them unless satisfaction should be given for the payment, were condemned as the property of the Dutch shipper.

On the whole, I am of opinion, that the goods included in this shipment were, during their transit, the property of and at the risk of the shippers, and therefore subject to condemnation. The claim of Mr. *Lisaur* must therefore be rejected.

In this connexion, it may be well to dispose of the claim of *Joaquim Martins Pinto*, of *Rio de Janeiro*. The shipment is made and the papers enclosed by Messrs. *Dyson Brothers & Co.* to their house at *Rio de Janeiro*, as in the former case. In the bill of lading no account or risk is stated, but the invoice is headed, shipped, &c. by order of and consigned to Messrs. *Dyson Brothers* and *Finney* for ac-

count and risk of *Joaquim Martins Pinto*. In a letter of the 4th of May, 1814, the shippers write to the consignees: "You are debited *l.233 19s. 4d.* for a case of stocking web ordered for *Joaquim Martins Pinto*; for the same sum we enclose first of our draft on Mr. *Pinto* at 30 days sight to your order at the exchange of eighty-two and a half per mil rea, which you can either make use of, or not, as you think proper." I do not think this can, in point of law, be favourably distinguished from the preceding case. Mr. *Pinto* is not, but the consignees are, debited with the amount. Had the shipment under these circumstances been to a third person, he must have been deemed the vendee, having the constructive possession and property of the goods and entitled to give any new direction to them. As the shippers and consignees are here the same persons, the language used shews, that it was not intended to vest any property in *Pinto*; but to leave the delivery and disposition of them to the house in *Rio*. The claim of Mr. *Pinto* must therefore be rejected.

The next is the claim of Messrs. *Antonio Roiz Dos Santos & Co.* of *Rio de Janeiro*.

The proof of property in the claimants hardly admits of a doubt. But as farther proof will be necessary, as to who compose the house of *Santos & Co.* and of the domicile of the partners, it may be well also to furnish the Court with proof of the orders sent to Messrs. *Dyson Brothers* respecting the shipments made by them.

The next is the claim of Messrs. *Heyworth Brothers & Co.* of *Rio de Janeiro*. The shipment is made by the house of *Ormerod Heyworth & Co.* of *Liverpool*, which, upon a careful examination of the letters, appears to be composed of the same persons as the house at *Rio*, viz. *Ormerod*

Heyworth and *James Heyworth* of *Liverpool*, and *Lawrence Heyworth* at *Rio de Janeiro*, and is upon the account and risk of the *Rio House*. The case therefore falls directly within the decision on the claim of *Dyson Brothers* and *Finney*. And this claim must be rejected.

The next is the claim of Messrs. *Turner Naylor & Co.* of *Rio de Janeiro*, which firm consists of *John Turner* and *George Naylor* of that place, and *John Todd Naylor* of *Wakefield* in *England*. The claim includes six distinct shipments. The first is shipped by *George Green* of *Liverpool* to *Turner Naylor & Co.* and the invoice and bill of lading express only a consignment to them. By a letter of the 4th of May, 1814, addressed by Messrs. *Nathaniel and Falk. Phillips & Co.* to the house at *Rio*, dated at *Manchester*, it appears that this shipment is made on the joint account of both houses. The moiety of Messrs. *Phillips* and the sixth part of Mr. *John Todd Naylor* must be condemned. And the two sixths of Messrs. *John Turner* and *George Naylor*, upon principles which I have already discussed, must be restored.

The second is shipped by *George Turner* and *Naylor* of *Liverpool* to the house at *Rio*, and in the invoice is stated to be sent by the order, and for the account and risk of the latter, by *John and Jeremiah Naylor & Co.* of *Wakefield*. As to a part of the bale No. 14 included in this shipment, it does not appear from the papers to have been shipped by order of the consignees. In the letter of the 30th of April 1814, of Messrs. *J. and J. Naylor* of *Wakefield*, to the house at *Rio*, they say "Please note the end of fine merino packed in bale No. 14 is quite a new article, which *J. T. Naylor* thinks will take in your market, of which pray advise us. Should it not, and there be any loss, debit us with it." And *John Todd Naylor* in a postscript

of a letter of the 30th of April, 1814, addressed to *George Naylor* at *Rio* says: "There is a piece of stocking stuff of a new manufacture sent out by *the house* in one of the bales; I think it is an article likely to answer; pray give me your sentiments upon it as soon as possible; if it answers, it can be for our account; if you think it won't answer, sell it for account of *J. and J. N. & Co.* It is almost as fine as silk net." It is clear therefore that this must be deemed the property of the house at *Wakefield*, and of course be condemned.

As to all the other packages, including No. 705 in a separate invoice, I must consider them as falling under the class of goods ordered by the consignees; and if *bona fide* the property of the consignees, two thirds must be restored.

But there appears from the letters in the case such an intimate relation both in blood and business, between the house at *Wakefield*, and the house at *Rio*, that I think myself called upon to require farther proof, as to the general connexion in business between these houses, and the terms and manner and circumstances, under which these and other shipments have been made. One third part of the property is at all events liable to condemnation.

The third shipment is by *George Turner* and *Naylor* of *Liverpool* to the house in *Rio* of 40 barrels of shot on joint account of the two houses, and of 109 firkins of butter on joint account of the same houses and *J. Todd Naylor*, one third each. Of the first parcel two thirds, and of the last parcel seven ninths, are to be condemned, the residue to be restored.

The fourth shipment is made by *George Turner* and *Naylor* to the house at *Rio*, and by a bill of parcels and letter in the case the goods appear to have been purchased of *Holgate Massey & Co.* at *Burley*, and debited by them to the house at *Rio*. There is no question there-

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fore as to the property—one third must be condemned and two thirds restored. The same may be observed of the fifth shipment bought of *Leonard Slater*, and of the sixth and last consisting of two bales of blankets.

The next is the claim of *P. F. Archango Dos Querubens*, *Procurator General of the Religious Order of St. Antonio*. This shipment is included in a bill of lading from *George Turner & Naylor* to the house of *Turner Naylor & Co.* at *Rio Janeiro*. The invoice is of two bales sent for by order of *Messrs. T. N. & Co.* to be delivered at the custom house of *Rio de Janeiro* to the *R. P. F. Archango Dos Querubens, Procurator, &c. &c.* or to whom may be acting for him, and signed by *J. and J. Naylor & Co.* In a letter of the 30th of April, 1814, in which the invoice and bill of lading were inclosed. *J. and J. Naylor & Co.* write to the house of *Turner Naylor & Co.* at *Rio*: "We have taken due note of the contents of your letters, but the request of the friars of *St. Antonio* to have their clothes exactly similar to those sent per *Roscus*, &c. arrived too late, the bales being on their way to *Liverpool*, when we received your letter; the directions we before received from you was not to exceed the former price. Inclosed you have their invoices for 16 bales and shipped per the *St. Jose Indiano* for your account and risk, viz. two bales *St. Antonio*, No. 4 and 5, amount *l.338 Os. 7d.* to be remitted for on arrival, &c." It appears also, that insurance is charged on these goods at *l.3 3s.* the same as the other goods confessedly belonging to the house at *Rio*. Under all the circumstances of this claim, the strong inclination of my mind is, that the goods in their transit were not at the risk of the friars of *St. Antonio*. As however farther proof is not strenuously opposed, I shall allow it to be given, reserving any absolute opinion till it shall come in.

The next is the claim of *March Brothers & Co.* of *Rio de Janeiro*, which firm consists of *William March* of *Liverpool* and *Thomas March* and *George March* of *Rio de Janeiro*. No question exists in relation to the two shipments included in this claim, which were purchased of *Mr. Joseph Shore*, and *Messrs. Brittain, Wilkinson* and *Brownell*. The title to this property is clearly in the firm; therefore two thirds are to be restored and one third condemned. There are two other shipments made by *Smith* and *Massey*, one consigned to *William March & Co.* and the other to *March Brothers & Co.*; and in respect to these shipments there are no papers, except two bills of lading, which express no account or risk and are enclosed in blank letters, viz. that to *W. March & Co.* enclosed to *March Brothers & Co.* and that to the latter enclosed to the former. Notwithstanding this apparent contrariety, it is probable that both houses are in reality the same. But in my judgment this enquiry is not material. I hold it to be clear law, that in a time of war parties are bound to put on board such papers, as shall evince the neutrality of the property, if it be entitled to that character; and where shipments are made from an enemy's country in an enemy's vessel, the presumption is, that every shipment belongs to enemies, on which a neutral character is not distinctly impressed. I condemn therefore these two last shipments to the captors.

The next is the claim of *Seaton, Plowes & Co.* of *Rio de Janeiro*. *John F. Seaton* of *London*, and *John Plowes* of *Rio*, are two of the partners of the house. It does not appear, who are the other partners, and as to the property, there is no question but that it belongs to the house. The general presumption of law is, where nothing to the contrary appears, that in a case like the present there are at least

three partners; and, as to captors, the partners are deemed to take in equal moieties, unless on the face of the original papers a different apportionment appears. And the reason of the rule is manifest, for were it otherwise, as the evidence to change the proportions must come from the enemy, whose interest it must be to diminish his own share as much as possible, the Court would, by admitting farther proof, be exposed to every species of belligerent fraud. In the present case, if the captors do not ask that farther proof may be admitted as to the other partners, I shall restore two thirds and condemn one third of the shipment.²⁰

The next is the claim of *William Harrison & Co. of Rio de Janeiro*. There is no question as to the title of the property, and upon an examination of the papers, it appears that the house at *Rio*, at the time of this shipment (for at a previous time a *Mr. Huntley* seems to have been in the firm) consisted of *William Harrison of Rio*, and the house of *A. and R. Harrison and Latham of Liverpool*. The evidence is very clear, that *A. and R. Harrison* are domiciled in *England*, and there is not the slightest intimation that *Latham* is not there also. I shall restore *William Harrison's* one quarter part and condemn the residue.

The next is the claim of *Francis and John Sommers*. The shipment was made on joint account of *Francis Sommers of Rio de Janeiro* and the *Rev. John Sommers, Mid Calder*. The share of *Francis Sommers* must be restored. If *Mid Calder* be, as I presume it is, in the north of *England*, the other moiety must be condemned. As to this fact I will hear proof, if the parties wish.

²⁰ This claim was afterwards ordered to farther proof as to the two thirds.

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The next is the claim of *Miller and Flenning* of *Rio de Janeiro*. The shipment is made on their account and risk, and appears to have been paid for out of funds of the claimants in the possession of the shippers. It is true, that the master has not in his answers sworn to the property of this shipment; and by the rigid rule of the prize law it might be deemed a case of farther proof.* But I cannot think so very plain a case will be urged to be within the range of the rule. I therefore restore the property.

The next claim, which requires any particular examination, is that of the master for his own adventure.

Claims of this sort, made by the master, are received with great indulgence by the Court, when he appears to testify with fairness, and conducts himself with good faith. There are however, in the present case, after all the deductions, which even liberal explanations allow to a stranger speaking another language, some discrepancies and difficulties in the master's testimony, that none of his affidavits (even if they were all admissible) have been able satisfactorily to clear up. In his answers to the standing interrogatories, he has enumerated the various packages, which he claims as his sole property.

In his claims he has included other packages, and particularly the whole invoice No. 4, amounting to *l.373 16s. 10d.* which in his answers to the standing interrogatories, he explicitly declared to be the property of *Messrs. De Costa, Guimaraens & Co.* The goods also in invoice No. 1 amounting to *l.1159 3s. 1d.* and invoice No. 2, amounting to *l.1698 13s. 5d.* in his interrogatories, he swore were his sole property; in his claim, made after an examination of the papers, he swears, that one third part of the same invoices

* *The Juno*, 2 Rob. 116, 122.

He purchased for one *Francisco Gaudencio Da Costa* of *Maranhão*. This is not all, for it appears in the accounts of the shippers, Messrs. *Da Costa, Guimaraens* and *Co.*, that the master is charged only with two thirds of these invoices—so that he could not be deemed the purchaser of the other third for *Da Costa*. The invoices of these two shipments (No. 1 and 2) are expressed to be on account and risk of whom it may concern, to be delivered to *J. J. Felis*, and on the invoice (No. 1) these words are added, “Deliver to *Sr. Felis* 7 cases of silk stockings.” In the bills of lading of the same invoices, the goods are to be delivered to the master; if absent, to *Sr. Domingo Gomez Louveira* and *Sons*. The same consignment is of invoice No. 4. If these shipments had been in reality for the account of the master, it is difficult to account for such an extraordinary consignment; if for the real, though concealed, account of Messrs. *Costa, Guimaraens* and *Co.*, the letter from Mr. *Costa* to Mr. *Louveira* of the 5th of May, 1814, and the letter of *Costa, Guimaraens* and *Co.* of the same date, to *Gomez Louveira* and *Sons* afford a key to the solution. It is also remarkable, that the invoices No. 3 and 5, which are charged in the account current as the master’s property, and I have no doubt are so, are, by order of the master, deliverable to his order, or on account of the master. And the bill of lading of No. 3 (which is the only one found) is to the sole consignment of the master. These are some of the circumstances, which certainly throw a shade over the claim of the master; and it seems to me hardly to be expected, that a court should so far throw the mantle of charity over the case, as to decree a restoration of the whole property. I shall decree a condemnation of the goods in the invoice No. 4, being perfectly satisfied, that they do not belong to the master. The goods in the invoices No. 3 and 5 are to be restored. As to the goods in invoices No. 1 and 2, I fear that the order for

farther proof, which I shall allow, is under all the circumstances a relaxation of the prize law, which stands on the utmost limits of indulgence. I hope that it may not be drawn into precedent.⁴¹

I give no opinion on the point, how far the master in this case is to be deemed to take the national character of the ship, in which he has sailed so many voyages from England. That point has not been argued, and upon the dry facts before me I have not felt it proper to touch that delicate subject.⁴²

As to the other claims in the case, I do not think it necessary to deliver any formal opinion. They are completely decided by the principles of law, which I have already stated, or depend on facts of the greatest simplicity.

Prescott and Wm. Sullivan, for the claimants.

Dexter and Pitman, for the captors.

⁴¹ See *post*, Oct. T. 1815, the final decree upon the master's claim.

⁴² *Vide the Embden*, 1 Rob. 16.

THE DIMON AND CARGO.

A general prize allegation cannot be properly joined with an information on a seizure for the violation of a statute.

THE information in this case alleged, 1. That at some port or place unknown, in some one of the colonies or dependencies of *Great Britain*, goods, &c. of the growth, produce or manufacture of *Great Britain*, were laden on board with intent to import the same into the *United States*, and that the same were accordingly imported. 2. That the ship, being owned by citizens of the *United States*, sailed

Louisetta.

under a British license or pass. 3. The third count charged a trading with the enemy, and concluded with a prize allegation.

STORY, J. It is improper to join a general prize allegation with an information for the infringement of a statute, the proceedings being very different in their nature.

THE LOUISETTA.

Practice as to costs and charges, where several parties intervene for separate interests.

Where a party claims under an attachment, he must file a caution in Court, to hold the proceeds remaining after satisfying prior claims.

THIS vessel was seized and libelled on behalf of the *United States*, afterwards libelled for seamen's wages, sold on interlocutory order, and finally decreed to be restored. *Hubbard*, of counsel for the owners and claimants, now moved the Court for a direction to the Clerk to pay over the proceeds, or at least so much thereof, as would compensate him as counsel, the Clerk having doubts as to his authority to pay them over, because he had understood there were attachments upon the same property, returnable to the State Court. There was no evidence of any attachment made; and it appeared, upon inquiry, that the party, claiming under the attachment, had done nothing more than to file a copy of his writ with the Marshal.

The Court said, they could not take notice of any attachment, unless a caution was filed in Court; and *Welsh*, of counsel for the claimants under the attachment, was directed to file such a caution.

The *Louisetta* was taken into custody under the seizure by the *United States* in June. The libel on behalf of the

Avery.

seamen was served in August. The Marshal had charged these libellants with the custody fees from the time the warrant on their libel was served. *Hubbard* for the owners and claimants, and *Welsh* for the seamen, contended that the vessel, being already in the custody of the *United States* under their seizure, and there having been an appeal from the decree of the District Court, so that it was necessary for the *United States* to retain the property in custody, this was properly a charge to the *United States*, and ought not to be borne, either by the owners, to whom restitution was decreed, or by the seamen.

The Court confirmed this reasoning, and said, the expenses must be borne by the *United States*, there having been probable cause, which excused the Collector.

 THE AVERY AND CARGO.

The Marshal is entitled to his full commissions, according to the act of 1790, ch. 125, upon all interlocutory sales of prize property. The act of 27th Jan. 1813, ch. 155, applies only to sales after final condemnation.

The Clerk is entitled to commissions upon proceeds of prize property sold by interlocutory order, and paid into Court by the Marshal.

It is the duty of the Marshal, upon all interlocutory sales, to bring the proceeds into Court, with a regular account of the sales.

STORY, J. The brig *Avery* and cargo were captured on the 28th of April, 1813; and prize proceedings having been instituted, part of the cargo was condemned, and the residue finally ordered to be restored by the District Court; and, on appeal to this Court, the decree of restoration was, at this term, reversed, and the whole property condemned to the captors. Pending the proceedings in the Court below, the goods, whereof restoration was afterwards decreed, were, in pursuance of an interlocutory order of the 28th of

Avery.

August, 1813, sold on the 7th of the ensuing September, and the proceeds paid over to the Clerk of the District Court on the 27th of the ensuing October.

An application has now been made, in behalf of the captors, to have the net proceeds paid over to them, after allowing to the Marshal his commissions according to the act of 27th Jan. 1813, ch. 155; and without any allowance whatever to the Clerk for commissions. Notice having been given to the Marshal and Clerk to show cause, why this application should not be granted, they have appeared and claimed the commissions allowed to them respectively by the act of 28th of Feb. 1799, ch. 125, sect. 1 and 2.

The questions have been argued, and are now to be decided. It is contended, in behalf of the captors, that the act of 28th Feb. 1799, ch. 125, which allows to the Marshal as fees "for sales of vessels or other property, and for receiving and paying the money, for any sum under five hundred dollars, two and one half per cent. for any larger sum one and a quarter per cent. upon the excess," is repealed, so far as respects prize causes by the act of 27th of Jan. 1813, ch. 155. This act, after providing that all vessels and property captured by private armed ships, and condemned as prize shall, after condemnation, be sold by the Marshal, in such lots, and on such credit, as the owners of the ship shall direct; and after farther providing, that the Marshal shall pay over and distribute the proceeds among the parties entitled, after deducting duties, costs and charges, declares, that for selling prize property, and receiving and paying over the proceeds *as aforesaid*, the Marshal shall be entitled to a commission of one per cent. and no more, first deducting all duties, costs and charges; with a proviso, that in no case of condemnation and sale of any one prize vessel and cargo shall his commission exceed two hundred and fifty dollars.

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It is very clear, that the terms of this act apply only to sales after a final condemnation, and not to sales made *pendente lite* under interlocutory decrees of court. Nor can it be admitted, that the intention of the Legislature requires a more enlarged construction. Interlocutory sales are often ordered under a perishable monition and survey, or for other good cause, in the discretion of the court; and such sales are invariably made for cash only. This becomes indispensable, because the rights of the parties litigating before the court are not ascertained, and the net proceeds are to be brought into the Registry, to await the final decision. Suppose a final decree of restoration should pass after such an interlocutory sale, are the commissions of the Marshal restricted to the provisions of the act of the 27th of Jan. 1813, ch. 155. It cannot be doubted, and indeed was conceded at the argument, that such a case was without the statute. And if it be so, I should be glad to know, how a subsequent decree of condemnation would vary his right? His title to the commissions accrues at the time of the sale, and not upon the final result of the cause. It attaches, if at all, at the moment when he has executed his duty, and paid over the proceeds of the sale to the court. He is then entitled to deduct his fees; and I know of no subsequent fact, that can have a retroactive effect to defeat his rights. On the whole, I am of opinion, that the act of 27th of Jan. 1813, ch. 155, applies only to sales of prize property after a final condemnation, and is so far and no farther a repeal of the act of 28th of Feb. 1799, ch. 125. The Marshal is therefore entitled to his full commissions.

As to the claim of the Clerk to one and a quarter per cent. commission, allowed him by the act of 28th of Feb. 1799, ch. 125, reviving the act of 1st of March, 1793, ch. 20, "on all money deposited in court," there is not, in my

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judgment, the slightest reason to contest it. The only argument urged against it is, that the money under the interlocutory sale ought not to have been paid into court by the Marshal; and that the Clerk cannot gain a title by an irregular act of the Marshal. The whole foundation of this argument fails. It was not only not an irregularity for the Marshal to pay the money into court, but it would have been a gross misconduct on his part to have done otherwise. It is his duty, on all interlocutory sales, to bring the proceeds immediately into court with a regular account of such sales. This is the known and uniform practice of the court, and I will add, it is a practice not only founded in the settled doctrines of the Admiralty, but also of great importance for the security of suitors. Let the Clerk, therefore, be allowed his usual commissions out of the prize property in the Registry.

G. Blake for the Captors.

Dexter for the Marshal.

Shaw, Clerk, for himself.

THE SAN JOSE INDIANO.

Practice as to payment of prize shares to special agents.

The Marshal is entitled to commissions upon prize property removed from his district, by consent of parties, to another district, and there sold.

G. SULLIVAN presented a petition of the officers of the private armed brig *Yankee*, praying that their shares in the proceeds of the prize, *San Jose Indiano*, should be paid over to their special agent, Captain *Snow*, they revoking the powers given by them to the general agents. They also prayed, that the shares of some part of the crew, represented by them, should be paid in the same manner.

A part of the property was still uncondemned.—Commissioners were appointed.¹

In this case, the prize goods, by an agreement of the parties, were removed from the District of *Maine* to *Boston*, and there sold by an auctioneer. The proceeds were paid into the Circuit Court, before which the cause was brought by appeal. A part of the cargo being condemned at this term, the Marshal claimed commissions.

J. T. Austin contended, that, as the law directed the property to be sold, when condemned, by the Marshal of the District, the Marshal of *Massachusetts* could not, in this case, be defeated of his rights, by the agreement of the parties. The property was originally in the custody of the District Court of *Maine*, but it being afterwards brought within this district, and here condemned, the right of the Marshal of *Maine* was transferred.

Pitman contended, that if any officer was entitled to commissions in this case, it was the Marshal of *Maine*.

STORY, J. said, that when it appeared to be for the interest of all parties, that the property should be sold at a different place, or by a different person, than would arise under the ordinary practice of the Court, and an agreement was made by the parties to this effect, the Court would ratify such agreement, taking care, however, that the Marshal should be protected in his rights. That in this case, it was the Marshal of *Maine*, who had a title to fees. If the property had remained in the District of *Maine*, and the cause had come up to this Court, by appeal, a warrant would have gone to the Marshal of *Maine* to sell the property.

¹ See the *St. Lawrence*, ante p. 19.

United States vs. Dodge.

UNITED STATES vs. DODGE, FOR A CONTEMPT.

Practice on contempts. If the party purge himself on oath, the Court will not hear collateral evidence for the purpose of impeaching his testimony, and proceeding against him for the contempt. But if perjury appear, the party will be recognised to answer, &c.

THIS was a process of attachment against the respondent, for a contempt in forcibly rescuing *T. P. Shaw*, a prisoner in the custody of the Marshal, under an indictment for treason.

Per curiam. We cannot receive any collateral evidence as to the offence, but if the respondent, by his affidavit, and answers on oath to interrogatories proposed by the District Attorney, discharge himself of the contempt, no farther proceedings can be had against him on the attachment. If, from any collateral evidence, it should appear, that there is reason to believe the respondent has perjured himself, we will recognise him to answer, at the next term of the Court, to such matters as may be found against him.¹

G. Blake, for the United States.

E. Sullivan, for the respondent.

The respondent was discharged.

¹ See, as to contempts and practice thereon. *Fin. Ab. Contempts* 4. B.—*Prac. Reg.* 99, 100.—*Gibb. Com. Pleas*, 20, 21.—12 *Mod.* 511. *Mod. Cas.* 73.—*Com. Dig. Chancery*, D. 3.—*Salk.* 321.—4 *Bl. Com.* 283.—*Rex vs. Horsley*, 5 T. R. 362.—3 *Hawk. P. C. B.* 2, ch. 22, s. 1. 32, 33, 34.—1 *W. Bl.* 640.—*Wyatt's Reg.* 139.—2 *Burr, R.* 796.—*Doug.* 516.—*Bac. Abr. Attachment*, B.

Argo.

THE ARGO, MERRILL CLAIMANT.

When there is an attorney of record, it is improper to take depositions without notice to him, or to the party.

When depositions are taken to be used against the *United States*, if there be an attorney of the *United States* within one hundred miles of the place of caption, he must be notified.

THIS was an information for a violation of the non-intercourse law. *Blake*, District Attorney, offered in evidence depositions, which had been taken in *New York* without notice, since there had been an attorney of record for the claimant.

Per curiam. Though depositions thus taken have been usually received, there are certainly great objections to the practice; and the Court have heretofore intimated a resolution to require notice to be given in all cases, where there is an attorney of record.

To prove that the vessel had not been at *Guadaloupe*, as alleged in the information, the claimant produced the depositions of several of the crew, which appeared to have been taken in *Boston*, and elsewhere within one hundred miles of the residence of a District Attorney, without notice to him. Upon objection by the District Attorney, they were rejected for this cause, and the Court observed, that in all cases, where there is an Attorney of the *United States* residing within one hundred miles of the place of caption, notice must be given to him of the taking of depositions, to be used in any cause, in which the *United States* are a party.

CIRCUIT COURT OF THE UNITED STATES.

RHODE ISLAND, NOVEMBER TERM, 1814, AT PROVIDENCE.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
 { Hon. DAVID HOWELL, District Judge.

INMAN vs. BARNES.

Actions of *formedon* are within the statute of *Rhode Island* for quieting possessions, and twenty years possession under that statute is a good bar.

If the statute of limitations has once run against a tenant in tail, it is a complete bar to a subsequent tenant in tail upon a descent cast.

A *formedon in descender* is not within the proviso of the statute of possessions of *Rhode Island*.

THIS was an action of *formedon in descender*, in which the demandant counted that one *John Inman*, being seized in fee, on the 28th of July, 1741, by his last will duly proved and approved, devised the demanded premises to one *David Inman* in fee-tail male general; and that, after the death of the testator, the said *David* entered into, and became seized of, the demanded premises, according to the form of the gift and devise aforesaid, and afterwards, on the 28th day of April, 1808, died; upon whose decease the demanded premises descended, by the form of the gift aforesaid, to the demandant, as the only son and heir male of the said *David*, and that the tenants unlawfully withheld the same.

The defendant pleaded in bar, among other pleas, the statute of *Rhode Island* entitled, "an act for quieting pos.

sessions and avoiding suits at law" commonly called the possession act, and averred, that he, and those under whom he claimed, had, by the space of 20 years and more next preceding the 28th of April, 1785, and from that time to the date of the demandant's writ, been in the uninterrupted, quiet, peaceable and actual, seisin and possession of the demanded premises, claiming the same for and during said time, as his and their property and rightful estate in fee simple. To this plea the demandant replied the proviso of the same act, and averred, that the said *David Inman* died on the 26th of April, 1808, and that, within ten years next thereafter, the demandant pursued his title to the demanded premises by due course of law in this action. To this replication there was a general demurrer and joinder in demurrer.

The cause was argued by *Bridgman* and *Searle* for the demandant, and by *Bowen* and *Burrill* for the tenants.

STORY, J. afterwards delivered the opinion of the Court.

Without entering into any consideration of the accuracy of the pleadings in this case (respecting which I wish distinctly to be understood as giving no opinion) I shall proceed to the only question, which has been argued by the parties, viz. whether twenty years possession, under the statute, be a good bar to an action of *formedon in descender*, the said term having run against a former tenant in tail before the descent cast.

At least as early as the year 1700, if not before, the statutes of limitations of 32 *Henry VIII.*, ch. 2, and of 21 *James I.*, ch. 16, were adopted in the colony of *Rhode Island*,¹ and in 1749 they were formally declared to be

¹ See the Act of 30th April, 1700.

the law of the land, and have ever since continued in force within that colony and state.² The act for quieting possessions and avoiding suits at law³ was first passed in 1711, without the proviso set forth in the replication, and that proviso was added in 1728; and in the revision in 1766, the whole was moulded into one act, in the shape it now assumes in the printed statute. All these statutes, therefore, may be considered as having a concurrent existence and operation for nearly a century. The second section of the act, stated in the bar, provides, "That where any person or persons, or others, from whom he or they derive their titles, either by themselves, tenants, or lessees, shall have been, for the space of twenty years, in the uninterrupted, quiet, peaceable and actual seisin and possession, of any lands, tenements or hereditaments within this state, for and during the said time, claiming the same as his, her or their proper, sole and rightful estate in fee-simple, such actual seisin and possession shall be allowed to give and make a good and rightful title to such person or persons, their heirs or assigns forever. And this act being pleaded in bar to any action, that shall hereafter be brought for such lands, tenements and hereditaments, and such actual seisin and possession being duly proved, shall be allowed to be good, valid and effectual in the law for barring the same." And the proviso stated in the replication is as follows, "Provided further, that nothing above contained shall extend, or be construed, or deemed to extend, to bar any person or persons having any estate in reversion or remainder expectant or depending in any lands, tenements or hereditaments, after the end or determination of the estate for years, life, or lives, such person or persons pursuing his or their title, by due course of law, within ten years after his or their right of ac-

² See *Colony Laws*, 1719, 1760, and 1766, p. 55, and also *Digest of the laws in 1798*, p. 73.

³ *Rhode Island Acts, Digest*, 1798, p. 465.

tion shall accrue, any thing in this act to the contrary notwithstanding."

It has been argued by the demandant's counsel, that actions of *formedon* are not within the purview of the statute of possession, in as much as the limitation of those actions is expressly provided for by the statute of 21 *James I.*, ch. 16; and if construed to apply to the same actions, they would be repugnant to each other. But it seems to me, that the statutes may well stand together. The statute of *James* regulates and limits the time, within which actions of *formedon* may be brought, and therefore simply operates by way of bar to the remedy of the demandant. The statute of possession, on the other hand, makes twenty years seisin and possession, under a claim of title in fee, in favour of parties and privies, a good and rightful title in fee forever; and therefore it operates as a bar of the right of every other party. In this respect, it is like the statute of 4 *Henry VII.*, of fines. The statutes are therefore made *diverso intuitu*, and the one may take effect, as a bar to the remedy, without the other's attaching as a bar to the right. If, for instance, the party entitled shall omit to bring his *formedon* within the twenty years limited by the statute of limitations, he is barred of his action; and the tenant may well plead it in his defence. But, although the twenty years have elapsed, yet the tenant cannot plead the statute of possession in his defence, unless he has held, or claims under those who have held, the seisin and possession during the same time, as tenants in fee.

The argument also involves this farther difficulty, that if it be well founded, it equally applies to the actions limited by the statute of 32 *Henry VIII.*, ch. 2; and then it would follow, in effect, that neither writs of right, nor writs of entry, nor indeed any real actions in modern use touching the fee, were within the purview of the statute of possession. But

the language of the act itself is decisive against this argument, for it expressly declares, that such seisin and possession shall be a good, valid and effectual bar "*to any action that shall thereafter be brought for such lands, tenements or hereditaments.*" Were it otherwise, I am not aware how it would help the demandant's case; for, at all events, he would, upon the facts alleged in the plea, be barred by the statute of *James*, for the present action was not brought until more than twenty years had elapsed after the right of the former tenant in tail to an action for the ouster had first accrued. And I take it to be well settled, that if the time limited has once run against any tenant in tail, it is a good bar not only against him, but also against all persons claiming in the descent *per formam doni* through him.⁴

We are now led to the second point made by the demandant's counsel, which is, that if actions of *formedon* be within the statute of possession, the present action is saved by the proviso. It is a rule applicable to this, as well as other statutes limiting or barring rights, that a party, who would extract himself from the enacting clause by any proviso, must bring his case strictly within the exceptions. It is plain, that a *formedon in descender* is not within the letter of the proviso. That applies merely to persons entitled to reversions or remainders expectant upon estates for life or years. In the case at bar, the tenant in tail, claiming in the descent, is neither a reversioner nor a remainder-man, whose estate is expectant upon any particular estate.—It not being within the letter, I know of no principle, which would authorize the Court to construe it within the equity of the proviso.

My judgment therefore is, that the plea in bar is good, and that the replication contains no matter sufficient in law to avoid it.

Replication adjudged bad.

⁴ 3 Cruise Dig. 541.—*Don vs. Warren*, 6 Mass. R. 328.

Ex parte Robbins.

EX PARTE ROBBINS.

In what manner the fees taxed for the district attorney are to be distributed, where part of the services have been performed in the time of one district attorney, and part in the time of his predecessor.

No delivery of property on bail can legally be made in cases, where the *United States* are a party, without due notice to the district attorney, that he may have a hearing before the court.

Quere, if a delivery on bail can be ordered by the court in vacation before the return term of the process.

STORY, J. This cause, though of great simplicity as to principle, has been loaded with voluminous documents by the inconsiderate zeal of the parties.

On certain informations pending in this Court against the ship *Euphrates* and cargo, the ship *Neptune* and cargo, the ship *Francis* and cargo, and the schooner *Two Brothers* and cargo, a considerable sum of money has been paid into court for the taxable costs due to the District Attorney of the *United States* in these causes. Of this sum six sevenths have been paid over without opposition to Mr. *Howell*, the late District Attorney, and present District Judge. The residue is claimed by Mr. *Robbins*, the present District Attorney, and this claim is resisted by the late District Attorney, and also by Mr. *Hazard*, who severally claim the same fees for their own use.

The informations were all filed by Mr. *Howell*, as District Attorney, returnable to the October Term of the District Court of *Rhode Island* in 1812. In consequence of the disability of the then District Judge, that term was not holden, and the Court was, by a written order of the Judge, adjourned by the Marshal without day. Previous to this time, in pursuance of a *certiorari*, under the stat. of 22d of March, 1809, ch. 94, all the causes pending in the District Court were certified to the November Term of the Circuit Court of the same year. The District Judge died on the 3d day of

Ex parte Robbins.

November, 1812, and, in consequence thereof, the causes were, at the same November term, remanded to the District Court. They were accordingly entered at the February term of the District Court in 1813, and thence continued to the next May term of that Court, when they were again certified to the Circuit Court, according to the Stat. of 24 Sept. 1789, ch. 20, on account of the District Judge having, as District Attorney, been of counsel in those causes. The commission of Mr. *Howell* bears date the 17th day of November, 1812, and Mr. *Robbins* was appointed District Attorney on the 9th day of December following.

At the June term of the Circuit Court in 1813, the causes were disposed of upon remissions granted by the Treasury Department of the *United States*, and the taxation of seventeen dollars as costs on each claim was allowed; and at the ensuing November term of the same Court, the money paid and to be paid on account of those fees was, by consent of the parties, ordered to be deposited in the registry, to abide the farther order of the Court.

After the informations were filed, and before the return term, in the case of the *Euphrates*, about sixty-six claims were filed; in that of the *Neptune* about fifty-eight claims were filed; and in that of the *Francis* about fourteen claims were filed, upon all which a delivery on bail was allowed. The residue of the claims in these cases, and all the claims in the *Two Brothers*, were either not filed, or not acted upon, until after the appointment of Mr. *Robbins* as District Attorney.

Prize allegations were also filed against the property not included in the foregoing informations, in the cases of the ships *Francis* and *Euphrates*, and claims were interposed therein by the *United States*. These claims of the *United States* were filed in the Circuit Court by Mr. *Hazard*, at the request of Mr. *Robbins*, with the assent of the Court.

Ex parte Robbins.

Mr. *Robbins* having been of counsel for the captors in those cases. For his services in this behalf Mr. *Hazard* has been compensated.

Such is a summary history of the transactions, out of which the conflicting titles before the Court have arisen.

In respect to the claim of Mr. *Hazard*, it may be at once dismissed from the cause. Whatever he did was as a substitute or agent under Mr. *Robbins*, and he could acquire no legal or equitable right to the taxable costs in these informations, which belong *de jure* to the District Attorney. Mr. *Hazard* never was *de facto* District Attorney, and therefore cannot legally interfere to bar the rights of his principal.

In respect to the other parties, it is contended by Mr. *Robbins*, that he is entitled to all the remaining fees, because nothing was done by Mr. *Howell* as District Attorney. On the other hand, it is contended by Mr. *Howell*, that all these fees accrued to him previous to the appointment of Mr. *Robbins*.

In my judgment, neither party is right in this statement. Mr. *Howell* certainly had the exclusive management of these informations until the appointment of Mr. *Robbins*. During this time, a large portion of the property was claimed, appraised, and delivered on bail. Admitting that the District Court can deliver property on bail in vacation, and before the return term of the process, (which admits of very serious doubts,) no delivery on bail could properly be made without notice to the District Attorney, and a hearing before the District Judge. The *United States* have an unquestionable right to be heard as to the propriety of a delivery on bail, the appointment of appraisers and sufficiency of the bail, and no delivery ought to be made until all objections have been heard and considered by the District Judge. It is to be presumed, that all this was done in

Ex parte Robbins.

these cases, either in fact, or informally, by the assent of the parties. For these important services, Mr. *Howell* is entitled to a compensation, for they were necessarily connected with the case. Farther, Mr. *Howell* represented the *United States* at the November term of the Circuit Court, and although the causes were not then finally decided, yet he was obliged to attend, to assert the rights of the *United States*, and to have the causes regularly disposed of. These were essential services, and there can be no doubt, that they are included in the taxable costs.

On the other hand, there is as little correctness in the suggestion, that all the professional labour was performed before the appointment of Mr. *Robbins*. Independent of his attendance in various applications for the delivery of the property on bail; at the February and May terms of the District Court, and at the June term of the Circuit Court in 1813, Mr. *Robbins*, as the District Attorney, had the sole control, management and disposal, of all these causes. He was bound to represent the *United States* in court, to see that proper continuances and other orders were entered on the records, and to take care that no prejudice should arise to the *United States* from any laches or default. For such services every counsellor receives an honourable fee, not merely *pro opere et labore*, but as a *quiddam honorarium* for professional responsibility. This is not all. Applications were made for remissions, in all or nearly all of these various claims, to the Treasury Department, and, as an incident of office, it became the duty of Mr. *Robbins* to attend to the petitions and evidence before the District Judge. I do not say, that this was a necessary appendage of the original causes, for which costs were to be taxed; but it was a collateral labour, which must have required great and diligent attention. When the remissions were obtained, it was the indispensable duty of the District

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Attorney to examine them, to exact a fulfilment of the conditions, and to prevent any cause from being, by mistake, discontinued in Court, which was not included in the terms of the remissions. This was a highly responsible duty; and required diligence, and patience, and accuracy. How then can it be contended with any propriety, that every professional labour was performed before Mr. *Robbins* succeeded to the office?

It is manifest then, that both of the respectable gentlemen before the Court are partly in the right, and partly under a mistake. Each of them has an equitable, as well as legal, title to a portion of the fees now in the registry.

The only remaining consideration is, how these fees are to be apportioned. The fees allowed were seventeen dollars on each claim, *vis.* for the interrogatories five dollars, for the libel or answer six dollars, and for all other services, six dollars. No interrogatories or answers were in fact filed; for all parties, for their mutual convenience, seem to have waived any formal proceedings. The courts have, in such cases, adjusted the taxable costs in the same manner, as if these proceedings were formally entered on the record *apud acta*. But not having been in fact filed by either party, neither Mr. *Howell* nor Mr. *Robbins* can strictly claim the fees, accruing from these services, to his separate use. Nothing more then can be done, than to make an equitable apportionment of the whole fees, according to some artificial estimate of their comparative services in the several causes, in which the costs were taxed. Upon a careful consideration of the subject, I am of opinion, that complete justice will be done to the parties for all their services, for which costs could be taxed, by allowing to Mr. *Howell* five elevenths, and to Mr. *Robbins* six elevenths, of the fees now remaining in the registry, the whole sum being, as the clerk has certified, 1486 dollars.

CIRCUIT COURT OF THE UNITED STATES,

MASSACHUSETTS, MAY TERM, 1815, AT BOSTON.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
 { Hon. JOHN DAVIS, District Judge.

MAISONNAIRE & AL. VS. KEATING.

A bill of exchange, expressed to be for the ransom of a vessel, and given as collateral security for the payment of the ransom bill, was held to be a contract, on which an action may be sustained in a court of common law—the plaintiff and payee being an alien friend.

In an action upon such bill of exchange, the capture must be taken to be justifiable, and the ransom regular.

A court of common law cannot, even incidentally, decide a question of prize.

It seems, that provisions, when destined to a port of naval equipment of the enemy, and a *fortiori*, if destined for the supply of his army, become contraband, and subject the vessel and cargo to confiscation by the other belligerent—more especially, if the country of the captured vessel be at war with the country, to which she is destined.

Of the probable cause, which justifies capture by a friendly belligerent.

Duress, arising from threats of destruction of the vessel and cargo, cannot be admitted to avoid a contract of ransom, where the capture was justified by probable cause.

It is competent for a friendly belligerent to ransom the property of a neutral after capture.—Of the foundation and nature of ransom.

The admiralty has exclusive jurisdiction to entertain suits on ransom bills.

ASSUMPSIT on a bill of exchange in the following words :
“ At sea, in the longitude of 27° West from *Paris*, and in the latitude of 37° 39' North, on board the privateer *Invisible*, *French*, of *Bayonne*, ninety days after sight this my first of exchange, second of the same tenor and date

unpaid, I promise to pay to Messrs. *Michael Maisonnaire* and *Derouet*, merchants, *Bayonne*, five thousand dollars, for the ransom of brig *Nancy & Mary* and cargo, to be paid at *Boston*. April 3, 1813. RICHARD KEATING."

Upon the trial of the cause under the general issue, it appeared that the bill was presented for acceptance on the 29th of March, 1814, and protested for non-payment on the 30th of June of the same year. It farther appeared, that the defendant was master of the brig, at the time of her capture by the *Invincible*; that she was an *American* vessel, and sailed, on the 7th of March, 1814, from *Wilmington, N. C.* bound to *Lisbon*, having on board a cargo of corn and rice of the value of \$ 15,000, and a protection and license for the voyage from the British government, commonly called a Sidmouth license; that, after the capture, the captain of the *Invincible* threatened to burn and destroy the brig and her cargo, and actually made preparation for that purpose, and that thereupon the defendant agreed to ransom the same for \$ 5000, and accordingly executed a ransom bill in the form prescribed by the French ordinances, and, as a collateral security, or in the language of the ransom bill, as a hostage,¹ gave the bill of exchange in controversy. Upon the execution and delivery of these papers, the vessel was released, and safely pursued her voyage to *Lisbon*, and had since returned to the *United States*.

Upon this evidence, a verdict was, by consent, taken for the plaintiffs, for the amount of the bill of exchange and interest, subject to the opinion of the Court upon the questions of law arising in the case. The defendants moved for a new trial, upon the grounds, which will appear in the argument and opinion of the Court.

¹ The bill of exchange was recited in the ransom-bill, and there said to be received "instead of hostage."

Prescott, and Blake, District Attorney, for the defendants.

1. In this case a common law court has no jurisdiction.

The act of the cruiser was either a marine trespass, or it was a capture as prize. If the former, then the promise was without consideration and void.

But the facts shew, that it was a taking as prize. The transaction was intended as a *ransom*, which may be defined, "a restoration of property captured, for the use of the owner, for a stipulated price." The contract of ransom grows out of the capture as prize, and is founded on it. The capture is the principal thing, and the ransom but an accessory.

This then is not a mere maritime question. It is not like the case of seamen's wages, arising partly on land and partly on the sea, and therefore of doubtful jurisdiction; but it is one depending solely on national law—on the *jus belli*. To determine, whether there was a consideration, it becomes necessary to inquire, whether the capturing vessel was commissioned, and whether there was probable cause for the capture. These are not questions to be submitted to a jury. As they grow out of a capture, they belong exclusively to the admiralty, and from the exclusive cognizance of that court there results a general benefit, in the uniformity of decisions in different countries.

The weight even of common law authorities is with the defendants. In the case of *Ricord vs. Beltingham*,³ the question was, what effect the death of the hostage should have; and the question of jurisdiction was waived by the counsel. In *Cornu vs. Blackburn*,³ the point of jurisdiction was not considered, and the principal subject of discussion was, whether by a capture of the ransom bill the contract was dissolved. In *Anthon vs. Fisher*,⁴ two judges

³ *Burr*. 1734—S. C. 1 *Black*. 563.

³ *Doug*. R. 641.

⁴ *Doug*. R. 649.

were against the jurisdiction, but the case was finally decided on another point.⁵

2. It is not competent for a belligerent to ransom the property of a citizen of a friendly nation.

This appears from the nature and form of the contract. It is called a repurchase, and the property is supposed to have been first divested. But the property of neutrals does not vest in the captors until condemnation. The property of an enemy is, by the law of war, divested immediately on the capture; but that of a friend can be forfeited only by some misconduct, which must be made judicially to appear. The cruiser has no authority to pardon.

It is essential to a ransom-bill, that it should protect the property ransomed to its port of destination.⁶ But the usual cause for the seizure of vessels of friendly powers being the carrying of contraband goods, the cruiser cannot grant a safe-conduct to the port of destination.

The owners of a neutral ship provide her with proper documents, and take upon themselves the risk of their being legal. They give no authority to the master to compromise.

The French law requires that a hostage be given together with the ransom-bill. No hostage can be given by a friendly power.⁷

3. There was no legal cause of capture.

If the cruiser have a right to ransom the property of a friend, it can only be, when it is lawfully captured. If the capture be unlawful, then the promise was extorted by violence and is not binding.

This Court has a right to inquire into the cause of the capture, and the legality of the ransom. It is not denied

⁵ See *Condy's Marshall*, 504.

⁶ 2 *Val.* 286. B. III. Tit. 9, Art. 19—1 *Emer.* 477—*Le Guidon*, Ch. 6, Art. 3, 7, 9.

⁷ 2 *Valin.* 282. Lib. 3, Tit. 9, Art. 19—1 *Code des Prises*, 278.

that the courts of the *captor* have this right. But in ransoming, the *captor* agrees to transfer the right to the court of the *captured*, in which, it is known, the contract of ransom must be enforced. It is incident to every tribunal, that has original jurisdiction, to inquire into the consideration and the manner of obtaining the contract. It would be a mockery, in such a case, to compel the *captured* to pay the ransom, and then to look to a court of the *captors* for damages.

What circumstances, then, were there in the present case, which could make the property good prize to the belligerent? It was American, regularly documented, and bound on a lawful voyage. There is no pretence of contraband. The British license, however it might be a cause of forfeiture to our government, could not be so to any other. The reasons for inflicting this penalty are, that the act of sailing under a license of the enemy involves a breach of the duty of the citizen; that it leads to a commercial intercourse, which, in time of war, is dangerous; that the citizen thereby creates a neutrality for himself; and that it shews a connexion with the enemy. With the conduct of our citizens, in any of these respects, a nation in amity with us can have no concern. It would have been lawful, in time of peace, to take such a certificate, and our rights are not altered by a war. Suppose that our government had permitted its citizens to take licenses of this description; could a friendly power interfere? It is to be recollected, that we were not allies of *France*.

The cargo was not for the use of the British, but was going to our own consul. There was, therefore nothing, which could justify a condemnation.

When the vessel was captured, the only question was, whether she was an enemy, or had forfeited her neutrality. The ransom shews, that the *captor* knew her to be an

American. The neutral character was not forfeited by merely having a British license on board.

But even if the circumstances were such, as to justify sending in, this would not authorize the master to ransom.*

D. Davis, and *Sohier*, for the plaintiffs. Two questions arise out of the facts, as they have been stated. 1. Has the Court jurisdiction? 2. Was there a legal consideration for the contract?

In regard to the first question, it is to be observed, that the case is within the express words of the statute. The jurisdiction of the Court *over the parties* is unquestionable, the plaintiff being an alien, and the defendant a citizen of the *United States*. The *subject matter*, too, or the contract, is one, which is every day enforced in courts of common law. It is a bill of exchange, and intended by the parties to be governed by the rules of the common law. But even if the laws of nations are to be taken into view, there would seem to be no reason, why these should not be noticed by a common law court, as well as the maritime or the ecclesiastical law.

This then being a contract between persons who were able to contract, and who were not subjects of hostile states, and being, in its nature, such as is usually enforced in courts of common law, the right of the plaintiffs, and the

* *Yates vs. Hall*, 1 T. R. 73--and *Heley vs. Grant*, *there cited*, and *Brown's Admiralty*, 260--were cited by the defendant's counsel.*

* In the course of the argument, *STORY, J.* inquired of the defendant's counsel, if they supposed the form of the contract to be of any importance? *Prescott*. If the ransom did not conform to the law of *France*, it could afford no protection against a subsequent capture, and so, not having the effect, which was contemplated by the parties, the ransombill ought not to be enforced. *STORY, J.* I have no doubt, that the law of *France*, as to the form of the contract, cannot affect its validity here. It is no more to be regarded, than the statute of *frands* would be in *France*, in reference to a contract for lands made in this state. *Prescott* said, it was not his intention to urge this point.

jurisdiction of the Court are established, unless some of the objections urged by the defendant should prevail.

It is said, that a question of prize is involved in the case, which makes it exclusively cognizable by the admiralty. But the contract, upon the face of it, does not necessarily involve a question of prize. The words in the bill of exchange, "for the ransom, &c." express the consideration for which it was given. It does not, from these words, appear, that the contract grew out of a capture as prize. A ransom bill may be given under such circumstances, that no legal question of prize or no prize can result.

It is difficult to imagine, whence the doubts arose in the minds of the judges in the case of *Anthon vs. Fisher*.⁹ They are completely answered by the argument of Dr. *Wynne* in reply to Dr. *Scott*.

This action is not founded on a ransom bill, and, in that respect, it is stronger than the case of *Ricord vs. Bettingham*,¹⁰ which is the only one, in which the question of jurisdiction has been decided.

Another important distinction, which differs this case from any arising in *Europe*, is, that by the statute creating this Court and defining its jurisdiction, the right of a common law remedy is expressly reserved to the citizen, in all cases where it may be had. The common law jurisdiction is uniformly preferred by the laws and constitution of our country. There is, therefore, every motive to induce the Court to adopt that construction, which favours the common law jurisdiction.

The reason that, in *England*, actions upon contracts, and for torts, which depend upon the laws of nations, are held to belong exclusively to the court of admiralty, is, that they are such, as must be governed by the municipal law entirely, if at all.¹¹ Such are marine assaults, forcible

⁹ *Doug. R.* 649.¹⁰ 3 *Burr, R.* 1734.¹¹ 4 *Bl. Com.* 67.

abduction of property on the high seas, &c. Here the whole subject matter is either out of the jurisdiction of the common law court, or within it. But the principle now contended for is, that where the court has jurisdiction of the principal question, it has also jurisdiction of the question of prize or no prize, if incidentally arising.

A contract made on the land to be executed at sea, is cognizable in the common law courts.¹² It is believed to be equally true, that a contract made at sea to be executed on the land, is cognizable at common law. Personal contracts have no *situs*; they are to be governed by the law of the place, where they are to be performed.

By enforcing this contract in a court of common law, the defendant is not deprived of any right, which he would have in the admiralty. In that court, the very giving of the ransom bill would be held an implied hypothecation of the ship. The general authority of the master would be sufficient for this purpose; but, in this case, the master was also an owner.¹³

The owners are bound, by the law of nations and the law merchant, to accept a bill of exchange drawn by the master of the ship for ransom.¹⁴

In the case of *Ricord vs. Bettingham*¹⁵ this question was expressly decided. Great interest was then excited by it, and the most eminent lawyers were engaged. *Blackstone*, after examining authorities and consulting foreign lawyers, declined to argue for the defendant. Lord *Mansfield* said, he was in favour of the jurisdiction upon princi-

¹² *Hoare vs. Unton*, 4 Inst. 139.

¹³ 1 *L. Ray.* 22, *Wilson vs. Bird*.—2 *L. Ray.* 331, *Treanter vs. Watson*.

¹⁴ *Mars. on Ins.* 432.—1 *Emer.* 472.

¹⁵ 3 *Burr*, 1734, but better reported 1 *Black.* 560.

ple, but doubted, principally, because it was confidently stated by counsel, that in other countries, an action would not be sustained on such a contract.

A question of prize, arising incidentally in a case of insurance, may be entertained and decided upon.¹⁶

It is contended, that the legality of the capture is admitted by the bill of exchange; but if the Court should be of a different opinion, the plaintiff is prepared to shew that the vessel was, to all intents and purposes, prize of war.

[*STORY, J.* This question is open only in consequence of your consenting, that the evidence should go to the jury, and having been open at the trial, it must be so here. I was prepared to rule against the admission of the evidence.]

Davis. From the facts, as reported, it is evident, that had the vessel been captured by an American cruiser and brought in, she would have been liable to condemnation by the law of nations.

[*STORY, J.* In the case of the *Julia*,¹⁷ the ground of decision expressly was, that the taking of a license impressed upon the ship a hostile character.]

Davis. It is upon that ground, that the plaintiffs rely. And farther, the license has all the effect of a British convoy. It is impossible to contend, after the principles that have been adopted in the cases decided, that this ship would not have been condemned, if carried into *France*.

¹⁶ *Berens vs. Rucker, Marsh. on Ins.* 430.—*Bingham vs. Cabot*, 3 *Dall.* 19.

¹⁷ *Ante* vol. 1, p. 594, S. C. 3 *Cranch*, 181.

[*STORY, J.* The case was thought stronger, at the argument of the *Julia*, with regard to a neutral than an American. Had a French vessel been going, with a British license, to supply the British armies, it would have been an unneutral act.]

Davis. Every reason that can apply to a neutral, applies with still greater force to a cobelligerent.

STORY, J. delivered the opinion of the Court. Three points have been argued in behalf of the defendant. First, That this is a question of prize, over which this Court, sitting in its common law capacity, has no jurisdiction. Secondly, That it is not competent for a friendly belligerent to demand or take a ransom, for restoring the property of a neutral after capture. Thirdly, That there was no legal cause for the capture, and consequently no valid consideration for the contract of ransom.

Each of these points involves important considerations of national law, and deserves a separate examination. For convenience, however, they will be discussed in an order, the reverse of that adopted in the argument.

¶ And, in the first place, was the capture legal? Assuming for a moment, that it is competent for a court of common law to entertain such an inquiry, this question must be answered by reference to the law of nations, and the prize regulations of *France*. For the legality of the conduct of the captors may, under circumstances, exclusively depend upon the ordinances of their own government. If, for instance, the sovereign should, by a special order, authorize the capture of neutral property for a cause manifestly unfounded in the law of nations, there can be no doubt, that it would afford a complete justification of the captors in all tribunals of prize. The acts of subjects, lawfully

done under the orders of their sovereign, are not cognizable by foreign courts. If such acts be a violation of neutral rights, the only remedy lies by an appeal to the sovereign, or by a resort to arms. A capture, therefore, under the Berlin and Milan decrees, or the celebrated Orders in Council, although they might be violations of neutral rights, must still have been deemed, as to the captors, a rightful capture, and have authorized the exercise of all the usual rights of war. It is quite another question, whether a neutral tribunal of prize would lend its aid, to enforce such captures, though, perhaps, in the strictness of national law, it would be bound to abstain from all obstruction of the captors.)

Under circumstances, therefore, it might have become material to the plaintiffs, to institute an inquiry into the law of prize, as regulated and administered in the tribunals of *France*. But, upon the facts of the present case, such an inquiry may well be waived. It is clear, beyond any reasonable doubt, that by the law of nations, the vessel and cargo were confiscable. Here was a cargo of provisions destined for the principal port of military and naval equipment of an enemy of *France*, and, as the British license obviously implied, for the use of the allied British and Portuguese armies acting against *France*. Admitting that provisions are not, in general, contraband of war, it is clear that they become so, when destined to a port of naval equipment of an enemy, and *a fortiori*, when destined for the supply of his army. Nor is this all. The carrier vessel and master were American, and open hostilities existed between the *United States* and *Great Britain*, at the very moment when the voyage was undertaken. It has been already settled in our own courts, that the acceptance of, and sailing under, a license of the British government, is such an act of illegality in an American citizen, as right-

fully subjects the property to forfeiture. The ground of this determination is, that the act is utterly inconsistent with the duties, which a belligerent citizen owes to his own government, and is such an incorporation into the objects and interests of the enemy, as stamps the party with a completely hostile character. It is certainly not competent, in general, for a friendly belligerent to enforce by confiscation the mere municipal regulations of a foreign government, or to punish foreigners for a mere breach of allegiance or duty towards their own government. But, it will be difficult to shew, that an act, which, by the law of nations, is held to impress a hostile character on the party with reference to his own government, shall not have precisely the same effect as to all other belligerents, against whom the act may be directed. The case of the *Clarissa*¹⁸ has been supposed to indicate a different doctrine; but it certainly will not support it, and, after the answer given to that case in the *Julia*,¹⁹ it is unnecessary to give it a farther consideration.

Upon either ground, therefore, that the cargo was contraband of war, or that the whole adventure was tainted with hostile interests and connexions, the property would have been justly condemnable as prize of war.

It is not, however, necessary to assume this ground, incontestible as it seems to be. It is sufficient to justify the conduct of the captors, if there be probable cause for the capture. In the present case, it is quite impossible to doubt on this point. The very presence of a British license, on board of an enemy's vessel laden with a cargo of provisions, afforded a violent presumption of concealed British interests, or of subserviency to British policy. The capture was strictly legal, and although this unfavourable

¹⁸ Cited 5 Rob. 4.

¹⁹ *Ante* vol. 1, 594—607—3 Cranch, 181.

presumption would not justify the destruction of the vessel and cargo on the high seas, yet it would have authorized a carrying of them in for adjudication, if not for condemnation. But even if the captors had proceeded to destroy the vessel and cargo, the only remedy for this wanton and unjust excess of authority would have been in the courts of the sovereign of the captors. The commission of the sovereign, although abused, would still exonerate the parties from the imputation of piracy.

And this leads us to the consideration of the argument, urged by the defendant, that the ransom bill was extorted by duress. There is no pretence, that it was procured by personal duress, or maltreatment. The only duress pretended is, the threat to burn and destroy the vessel and cargo; and the ransom bill was given to save them. Threats of this sort cannot, either by the common or the maritime law, be admitted to avoid a solemn contract of ransom, where the capture was justified by probable cause; and *a fortiori*, where condemnation must have ensued the regular prize proceedings. The first ground of defence cannot be supported.

The second question is, whether it be competent for a friendly belligerent to demand, or take, a ransom for restoring the property of a neutral after capture. It is argued by the defendant, that every ransom supposes a vested right in the captors; that this does not exist in respect to neutrals, for the captors have only a right to bring in for adjudication; that neutral property is liable to condemnation, only in case of delinquency; and that captors have no right to remit, in behalf of their sovereign, a forfeiture for violation of neutral duties.

It is not true, however, that the right to take a ransom is founded in a vested title in the captors to the captured property. For, whether the property vest after twenty-

four hours possession, or after bringing *infra præsidia*, as seems the doctrine of civilians ; or after condemnation, as is the doctrine of *Great Britain* ; it is clear, that the right to take a ransom exists from the moment of capture. And, by the general practice of the maritime world, a decree of condemnation is deemed necessary to ascertain and confirm the inchoate title of the captors, at least in respect to the sovereign and subjects of their own country. Nor is a ransom, strictly speaking, a repurchase of the captured property. It is rather a repurchase of the actual right of the captors at the time, be it what it may ; or, more properly, it is a relinquishment of all the interest and benefit, which the captors might acquire or consummate in the property by the regular adjudications of a prize tribunal, whether it be an interest *in rem*, a lien, or a mere title to expenses. In this respect, there seems to be no legal difference between the case of a ransom of the property of an enemy, and of a neutral. For if the property be neutral, and yet there be probable cause of capture, or if the delinquency be such, that the penalty of confiscation might be justly applied ; there can be no intrinsic difficulty in supporting a contract, by which the captors agree to waive their rights in consideration of a sum of money voluntarily paid, or agreed to be paid, by the captured. Indeed, the case stands upon a stronger ground, than that of a ransom between enemies ; for the latter have not, in general, a capacity to enter into contracts. The very law of war prohibits all commercial intercourse, and suspends all existing contracts between enemies ; and the case of ransoms is almost the only exception, which has been admitted, from the general rule. If, then, neither the subject matter, nor the nature of the title or consideration, nor the capacity of the parties, presents any serious objection to the contract, as between a friendly belligerent and a neutral, it

remains to consider, if there be any thing in the objection, that it is a remitter of the right of forfeiture, which belongs exclusively to the sovereign.

The commission of the sovereign, in general, authorizes only captures of enemies' property. But without any express clause, this commission clearly extends to the capture of all neutral property seized in violating neutral duties, for in such case the property is deemed *quasi* enemies' property. And, for the same reason, it authorizes the bringing in of property, under neutral passports and papers, for adjudication, where there is probable cause to suspect its real character; for, until adjudication, it cannot be ascertained, whether it be entitled to the protection of the neutral character. If, therefore, the commission gives hostile property to the captors, and enables them to deliver it up on ransom, it also enables them to do the same in respect to neutral property, which has acquired a hostile taint; and the ransom is not, in the one case, any more an exercise of the sovereign's prerogative to remit a forfeiture, than it is in the other. In both instances, it is considered, by the law of nations, as a mere *remitter* of the rights of the captors acquired *jure belli*; and every prohibition of its exercise must expressly depend upon the municipal regulations of the particular country. Upon principle, therefore, the distinction of the counsel for the defendant, as to the incompetency of a belligerent to deliver neutral property on ransom, is unsupported; and there is not a scintillation of authority in its favour.

The next and most important question is, whether this is a case within the jurisdiction of a court of common law. It has been truly said by the plaintiffs' counsel, that the plaintiffs, being alien friends, are entitled to sue in this Court; and, that a bill of exchange is a contract clearly cognizable at the common law. There is nothing, there-

fore, in the character of the parties, or of the contract, which should induce the court to decline jurisdiction. It is the *consideration* of the contract, which purports on its face to have been given for a ransom, and was in fact given as collateral security for a ransom bill, that creates the difficulty of entertaining jurisdiction. It is argued, that the legality of the consideration of a bill of exchange may always be inquired into, and that, as the legality of a ransom bill involves the question of prize or no prize, a court of common law is not competent incidentally to decide such a question. It exclusively belongs to the admiralty to adjudicate on questions of prize, and by parity of reason also on questions of ransom.

Primarily, all questions of prize belong to the tribunals of the capturing power; and foreign tribunals will not interfere, unless where their territorial jurisdiction or rights have been violated. And ransoms, taken upon captures, belong to the same jurisdiction, and may be there enforced or set aside. It is however competent for the captors, if they so choose, to change the *forum* in cases of ransoms, and to apply for redress in any country, where the person or property can be found. And, in such case, the proper tribunal undoubtedly is, a court sitting to administer the law of nations. Whether a foreign court is bound to enforce such a ransom without inquiring into the legitimacy of its origin, upon the principle of comity; or whether it will remit the parties to their own *forum*, to ascertain and settle that point; or will of itself examine and decide it; it is not now necessary to consider. On a proper occasion, it will be fit to give the subject a very liberal and dispassionate consideration. At all events, there can be no doubt, that a ransom is a subject within the jurisdiction of the admiralty. It is taken for granted in the discussions of the courts of common law, and has been asserted without contradiction by the admiralty.

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Is this jurisdiction *exclusively* vested in the admiralty? On this point the parties are at issue; and the same authorities have been pressed into service on both sides. Three cases have been relied upon, viz. *Ricord vs. Bellingham*,³ *Cornu vs. Blackburne*,²¹ and *Anthon vs. Fisher*.²² In all these cases, the action was brought directly on the ransom bill in a court of common law. In the first, the point of jurisdiction was expressly waived by counsel, although stated in the report to be greatly relied upon by civilians. In the second, the point was not started. In the last, the exception was taken by *Doctor* (now *Sir William*) *Scott* on the argument in the King's Bench, when Lord Mansfield declared his opinion in favour of the plaintiff; *Willes, J.* and *Buller, J.* thought that the courts of common law had no jurisdiction, and that the objection might be taken, although not particularly pleaded; *Ashurst, J.* expressed doubts on that point, and judgment was given *pro forma* for the plaintiff. This judgment was afterwards reversed in the exchequer chamber upon another point, so that the question of jurisdiction never came to a solemn decision. It remains therefore to be determined in the case at bar.

And I have no hesitation to pronounce, that the cognizance of ransom bills exclusively belongs to the admiralty. They necessarily involve the question of prize or no prize, of the legality of the capture, and of the regularity of the commission and conduct of the captors. They also may involve questions as to the prize ordinances of foreign governments, the practice and regulations of courts of prize, and the rights and duties of neutrals. Of most of these questions, it cannot be pretended, that courts of com-

3 *Burr. R.* 1734, *S. C.* 1 *Black. R.* 563.

²¹ *Doug. R.* 641.

²² *Doug. R.* 649, note 1.

mon law have cognizance, and all of them seem more fit for the investigation and determination of a court of the law of nations. Every reason urged in the case of *Le Caux vs. Eden*²³ against the jurisdiction as to prize, applies with equal force as to ransoms. Indeed, it might be correctly declared, with greater force; for the rights of *foreign* captors, a subject of a very delicate and national character, necessarily come into discussion; and these rest upon the great doctrines of the *jus belli*.

It is very clear, that, in this case, no action for damages could be maintained at common law, even if the capture had been tortious; for it was a taking as prize. Admitting that trespass will lie, at common law, for a marine tort on the high seas (a doctrine somewhat difficult to sustain upon principle, although not upon authority) it is otherwise, if the supposed trespass be a seizure as prize. And it is immaterial, whether the objection be presented directly on the record, or arise at the trial, for if the decision of prize or no prize be involved, it exclusively belongs to the admiralty. And this leads us to the argument of the plaintiffs' counsel, that where the principal matter is cognizable at common law, every incident of prize may be there also tried.

I should pause a great while, before I should admit the soundness of this doctrine, in the latitude, in which it is stated. If a question of prize be necessarily involved in the foundation of an action, whether it be as a principal or as an incident, I shall be glad to learn, how the common law can draw it *ad aliud examen* than the prize jurisdiction. Suppose a question as to the right to prize proceeds should arise; could a court of common law, in an action for money had and received, incidentally entertain the question, as to

²³ *Doug. R.* 594.

who are the actual or constructive captors? Such a jurisdiction has never yet been asserted.²⁴ Suppose a marine assault and battery were the subject of a suit, could the common law sustain an inquiry into the nature and propriety of the supposed trespass, when it appeared to have been an incident to a capture? Such a pretension has been expressly overruled.²⁵

It is said, however, that in an action on a policy of insurance, the question of prize has been and may be legally entertained and decided. The cases cited do not come up to the position. Wherever any remarks, touching the legality of captures, have fallen from the court, they have been made with reference to the conduct of the captured, or to the effect of sentences of condemnation and acquittal in matters of prize. In no instance has the court undertaken to decide a question of prize, forming a necessary incident in such a cause. And it is extremely difficult to conceive how it could so do. For if the admiralty has, as it is conceded on all sides it has, jurisdiction over the incidents, as well as the principal matter of prize, it must be just as much exclusive in the first case, as in the last. And it would be strange, if the admiralty might decide an incident of prize one way, and a court of common law might collaterally overrule the sentence.

Upon the mere footing of general reasoning, it appears to me difficult to resist the impression, that the cognizance of ransoms belongs exclusively to the admiralty. And, taking into consideration the clear opinion of civilians, and the judgment of Mr. J. Buller and Mr. J. Willes, in *Anthon vs. Fisher*, after a very elaborate argument, the weight of

²⁴ *Cambden vs. Home*, 4 T. R. 382.—*Duckworth vs. Tucker*, 2 Taunt. R. 6.

²⁵ *Le Caux vs. Eden*, Doug. 594.

authority is on the same side. If, therefore, this were an action upon a *ransom bill*, I should be prepared to deny the jurisdiction of a court of common law.

Can the case of a bill of exchange, given as *collateral security* for the payment of a ransom bill, be distinguished in principle? This question presents the turning point of the cause, and is not unattended with difficulties. On the one hand, if the legality of the consideration be, under all circumstances, inquirable into, then the same questions of prize may arise, as on the ransom bill itself. On the other hand, the contract of exchange is clearly cognizable at common law, and it is not easy to see, how the collateral origin of the consideration should defeat the jurisdiction. It never was imagined, that an action upon a policy of insurance could be defeated, at common law, by the circumstance that the loss claimed was a ransom after capture; and as little can it be imagined, that, in such an action, it is competent for the court to settle the question, whether the property be good prize or not. Suppose a mortgage of land had been given as collateral security for the ransom, would the admiralty have entertained jurisdiction, to give possession to the captors, or to foreclose the equity of redemption? No person would pretend to assert such a doctrine. Suppose, on the other hand, a stipulation, and a mortgage as collateral security, on the bailment of captured property, would a court of common law entertain an inquiry as to the legality of the capture, before it could enforce it?

On the whole, on this point I have come to the conclusion, although not without diffidence, that the present action may be sustained in this court. I consider the bill of exchange, as the parties have considered it, as merely collateral to the ransom. The consideration of it, involving matter of prize, is not inquirable into at common law. It must here be taken, that the capture was justifiable, and the ransom

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regular. If it were otherwise, a remedy lies in the admiralty courts of *France*, and perhaps of the *United States*, to set aside the ransom bill, and restore the parties to their rights. If an action were brought, at common law, upon a collateral security like the present, under circumstances calling for inquiry, the court might suspend its judgment, or a court of equity might grant an injunction, until the parties should have ascertained, in the proper prize tribunal, the validity of the ransom bill, or of the original capture.

I have the less hesitation in adopting this conclusion, because the facts of the case abundantly shew, that the capture was rightful, and that of course the ransom was valid. It would, therefore, be turning round the parties to another jurisdiction without a hope of benefit.

I will only add, that if I had thought the case not cognizable at common law, the circumstance, that the objection was not pleaded in abatement, would have had no weight with me. Where the subject matter is not within the jurisdiction of the court, the exception may be taken under the general issue.

Let judgment be entered on the verdict for the plaintiffs.

THE JERUSALEM, CATARA.

The admiralty has jurisdiction of suits in favour of material men.

A tradesman has a lien on a foreign ship, lying in a port of the *United States*, for repairs made by him on board, and such lien will be preferred, in point of right, to a bottomry interest, which is prior in point of time, if it appear that the repairs were indispensable.

Practice, as to taxation of costs, in case of a claim on proceeds, where other parties are interested.

THE Greek ship *Jerusalem* having been libelled in a case of bottomry, and sold under an interlocutory order of this

Court, an act on petition was interposed on behalf of *Henry Dewhurst*, praying an allowance out of the proceeds, in preference to the bottomry interest, of a sum due him for repairs of the ship since her arrival in the port of *Boston*.

The circumstances attending the voyage of this ship will be found detailed in the case of *Kleine vs. Catara*.¹

A. W. Fuller, for the libellant. This case is to be distinguished from the ordinary cases, in which the lien for repairs is lost by parting with the possession of the thing repaired. The libellant never had possession or control of the ship. He merely went on board, and made some necessary repairs of the pumps. It was impossible for him to remain on board until he was paid. He has not, therefore, voluntarily relinquished his lien.

The lien for repairs must take precedence of the bottomry bond. The repairs were necessary to preserve the ship, even if she were to remain in the harbour till she could be sold. It must be presumed that the ship was actually sold, in consequence of the repairs, for as much more as would pay for them. It has been holden, that the lender on bottomry is liable to general average,² and entitled to salvage.³

This may be considered a continuation of the original voyage.⁴

But if the Court should be of opinion, that this is not a continuation of the original voyage, and that the bottomry bond was forfeited, the lender on bottomry is nevertheless interested in the preservation of the ship. He may have no other means of securing his money; for it is to be presumed, that the borrower on bottomry would not pay ma-

¹ *Ante* vol. II. p. 61. ² *Mars. on Ins.* 760. ³ *Ibid.* 764.

⁴ *Herniman vs. Bowden & al.* 3 Burr, R. 1844.—1 *Ld. Ray.* 397, 632.

rine interest, if he were responsible enough to obtain money on his personal security alone. Again, freight earned in a subsequent voyage is holden to pay the bottomry bond of a former voyage.⁵

There is a distinction between repairs made on a ship in the place where the owner resides, and those made on a foreign ship.

In the first case, the repairs are made on the credit of the owner, and there is no lien on the ship.

In the latter case, the credit is given to the ship alone, and the mechanic has a specific lien on the ship for payment.⁶

In some of the United States, legislative provision has been made, to secure the mechanic, and in other states the courts have intimated their intention to support so equitable a lien.⁷

On the part of the respondent, the cause was submitted without argument.

STORY, J. delivered the opinion of the Court. The question here does not singly depend upon the right of the admiralty to entertain suits in favour of material men. If there be any persons, who doubt that jurisdiction, I beg not to be comprehended in the number. In my judgment, and

⁵ *The Barbara*, 4 Rob. R. 1.—*The Jacob*, 4 Rob. R. 245, 260.

⁶ *Abbott on Shipping*, 115, 95, 149, 160.—*Watkinson vs. Bernadistott*, 2 P. W. 267.—*Ex parte Shank & al.* 1 Atk. R. 234.—*Lister vs. Buxton*, 1 Strange, R. 695.—*The John*, 3 Rob. R. 283.—*Buxton vs. Shee*, 1 Ves. 154.—*Farmer & al. vs. Davies*, 1 T. R. 109.—*Westerdell vs. Dale*, 7 T. R. 312.—*Rich vs. Coe & al.* Comp. R. 636.—*Hussey vs. Allen & al.* 6 Mass. Rep. 165.—*Gardner & al. vs. Ship New Jersey*, 1 Peters, R. 223, 233, 237—and opinion of Winchester, J. in note, p. 233.

⁷ *Woodruff & al. vs. ship Levi Dearborne*, 4 Hall's Amer. Law Journal, new series, 97.

I speak after having given the subject a very grave consideration, the admiralty has always *rightfully* possessed jurisdiction over all maritime contracts ; and the decisions of the courts of common law, prohibiting its exercise, are neither consistent in themselves, nor reconcileable with principle. In the struggle between the courts of common law and the admiralty, which originated in the same spirit, that attempted to break down the whole system of equity, it cannot be denied, that the former have manifested a great degree of jealousy and hostility, fostered by strong prejudice and a very imperfect knowledge of the subject. It is not, therefore, to be wondered at, that in such an unequal contest, where the power was all on one side, the admiralty should have lost many of its inherent rights. In more modern times, when the jurisdiction of the admiralty has been better understood, a more liberal policy has been pursued, and, where they have not been fettered by authority, judges have been more indulgent in allowing its exercise. The true doctrine was always asserted by the learned judges of the admiralty, and has been recently recognised by Mr. Justice *Buller* ; that the jurisdiction as to contracts depends not upon the locality, but upon the subject matter, of the contract.⁹ And I have not the slightest hesitation in holding, that the admiralty has perfect jurisdiction over all maritime contracts. The decisions at common law, on the subject of its jurisdiction, have nothing to recommend them, and certainly are not binding on us. The constitution and laws of the *United States* have confided to the courts of the *United States* cognizance of "all civil causes of admiralty and maritime jurisdiction," and what is the true limit of this jurisdiction must be judged of, not by hasty decisions upon prohibitions, but by the history, prac-

⁹ *Monetons vs. Gibbons*, 3 T. R. 267.

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tice and law, of the admiralty, as it is found expounded, with admirable learning and sagacity, by the judges who have presided in that court.⁹

In respect to material men, the jurisdiction has been enforced and exercised by Mr. Justice *Winchester*, than whom no man in the *United States* ever better understood the true principles and doctrine of the admiralty law.¹⁰ Until I am taught a different rule by the highest tribunal, I shall continue to assert the original inherent powers of the admiralty in the full extent, in which they were recognised in *England* until the unhappy controversies with the courts of common law.

Admitting the jurisdiction, the next question is, whether the petitioner be entitled to the relief prayed for. This depends upon the consideration, whether he have a lien or not upon the ship for the repairs. It will be recollected that this is a foreign ship, and that, by the general maritime law, every contract of the master for repairs and supplies imports an hypothecation. It has been supposed, that the rule of the common law is different. But it has never yet been extended to cases of repairs of foreign ships, or of ships in foreign ports. I hold, therefore, that the contract for repairs in this case, being of a foreign ship, is to be governed by the maritime law, and created a lien.¹¹ Whether, in case of a domestic ship, material men have a lien for supplies and repairs furnished at the port where the owner resides, I give no opinion. There are great authorities on both sides of the question, though upon principle,

⁹ See *Exton, Godolphin, Zouch, and Jenkins, on the Admiralty Jurisdiction—passim.*

¹⁰ *The Sandwich*, 1 *Peters, R.* 233—note.

¹¹ *The John*, 3 *Rob. R.* 288.—*The Eagle*, *Bee's Rep.* 78. The Supreme Court of the *United States* have recently held that material men have a lien on a foreign ship for repairs done. *The Aurora*, 1 *Wheaton, R.* 96, 103.

independent of common law authorities, it does not seem to me, that there is much room for doubt.¹² Be this as it may, it cannot affect the jurisdiction of the admiralty in such cases, for that stands altogether independent of the doctrine of liens, and may be enforced as well by process in *personam*, as in *rem*.

If then the repairs in this case were a lien on the ship, it remains to consider, whether they constitute a privileged lien, entitled to a preference over a bottomry interest; for the proceeds now in court are insufficient to answer both claims. In point of time the bottomry interest first attached, and the right became absolute by a completion of the voyage, before the repairs were made. Upon general principles, then, the rule would seem to apply, *qui prior est tempore, potior est jure*. But it is to be considered, that the repairs were indispensable for the security of the ship, and actually increased her value. They are, therefore, not like a dry lien by way of mortgage or other collateral title. The case is more analogous to that of a second bottomry bond, or the lien of seamen's wages, which have always been held to have a priority of claim, although posterior in time, to the first bottomry bond.

Let a decree be entered for payment of the sum claimed by the petitioner out of the proceeds of the sale.

[After the decree was pronounced, *Fuller* moved the Court for a direction to the clerk, as to the costs to be taxed in this case.

¹² See *Woodruff vs. The Ship Levi Dearborne*, 4 *Amer. Law. Jour.* 37.—*The Sandwich*, 1 *Peters*, Rep. 233, n.—*The Ship New Jersey*, 1 *Peters*, R. 223.—*Hassey vs. Christie*, 9 *East*, R. 426.—*Abbott on shipping*, P. 2, ch. 3, s. 9, 3c.—*Rich vs. Coc*, *Comp. R.* 636.—*Farmer vs. Davies*, 1 *T. R.* 109.—*The John*, 3 *Rob. R.* 233.—*The Lady Horatia*, *Bee's Rep.* 167.

 Peabody vs. Denton & al.

By the Court. In a case, like this, of a claim on proceeds in the custody of the Court, where other parties are entitled, nothing can be allowed beyond that, for which there is a specific lien, and the actual charges of court. No attorney's fee can be allowed.]

PEABODY vs. DENTON & AL.

Of the evidence to prove a lost note.

A notarial copy was permitted to go to the jury, as a fair ground for presuming, when taken in connexion with the testimony of a witness, that the paper exhibited to the notary was the same, which had been in the witness's possession, and acknowledged by one of the defendants.

ASSUMPSIT on a promissory note made by the defendants and two others, at *Aux Cayes*, in the year 1797, signed "*Denton & Co.*" and "*Nathan Brothers & Co.*" and endorsed by the payee, *Endicott*, to the plaintiff.

The defendants pleaded—1. The general issue—2. *non assumpsit infra sex annos*—3. *actio non accrevit infra sex annos, &c.*

At the trial, the original note was not produced, but a witness, on behalf of the plaintiff, stated, that in the year 1797, at the request of the plaintiff, he carried the note to *Aux Cayes*, to collect; that *Hall* and *Brothers*, the other promissors, having failed, he demanded payment of *Denton*, who admitted the note to be due; that he did not bring back the note, but lost it in some manner unknown to himself; that *Endicott* was a ship master in the service of the plaintiff, and in that capacity was in *Aux Cayes* about 1796 or 1797; that he did not recollect the note to have been endorsed by *Endicott*, but presumed it was so; that the note was never paid to him; that he conversed with *Hall* about the note, but did not remember to have shewn it to him.

The plaintiff also produced a letter from *Denton* to his agent *Wellman*, dated *Leeds*, 29th of April, 1805, containing these words—"If you obtain payment of my ordinances, I wish you to pay the amount of the note in favour of *Endicott*."

A paper was also offered in evidence by the plaintiff, which purported to be a notarial copy of the note declared on. It began as follows: "The following recorded by Captain *Joseph Peabody*, 17th May, 1797." Then followed a copy of the note and endorsements, with a certificate of the Clerk of the Common Pleas for the County of *Essex*, that the whole was truly copied from notarial records deposited in his office.

Prescott, for the defendants, objected to this paper's going to the jury. It could be evidence of nothing, but that a paper of similar tenor was shewn to the notary. There was no evidence to prove, that the paper, thus exhibited and copied, was the same, which had been in the hands of the plaintiff's witness, for the witness did not recollect any date or sum, by which to identify it. Though, in the present case, the plaintiff's character was a sufficient guarantee against any fraudulent proceeding, yet the rules of evidence were necessarily general, and if a notarial copy be admitted as evidence, not only of the existence of the paper, but of its genuineness, it would be easy to fabricate a writing for the very purpose of founding a demand on the copy, at some distant time. At any rate, the copy could not be evidence of the amount of the note.

STORY, J. I have no doubt, that the copy is admissible, to prove that such a paper was exhibited to the notary, though it could not of itself be evidence, that the paper was genuine. Connected with the testimony of the witness,

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however, it affords a fair ground of presumption, to be left to the jury, that the paper copied by the notary was the same, which the witness carried to *Aux Cayes*, and which was there recognised by *Denton*.

Prescott then objected to the competency of the whole evidence to support the plaintiff's action, contending that there was no proof of the signing of the note by *Nathan Brothers and Co.*, and that the note might still be in existence, and be again demanded of the defendants by a *bona fide* holder.

But it was the opinion of the Court, that after so great a lapse of time, it was incumbent on the defendants to shew, either that the note existed, or that it had been demanded of them; and that it must be presumed, that no demand would now be made.

*Verdict for plaintiff.*¹

Sektonstall, for the plaintiff.

¹ It appeared that the defendants were domiciled in a foreign country, which was a sufficient answer to the plea of the statute of limitations, unless it were shewn by the defendants, that they had been within the country since the making of the note.

HUBBARD & AL. vs. COOLIDGE & AL.

If a policy of insurance authorize the ship to stop at a particular port, it is not necessary for the assured to disclose that the ship will call there, although he has information of the fact.

The plaintiffs having stated to the underwriters, in answer to some general inquiries, "that they had no knowledge that the ship would call at the *Cape*, and knew of no motive for calling there, &c.;" and no farther inquiries being made by the underwriters, this was not a misrepresentation, to avoid the policy.

A representation, as to the destination of the ship, if true at the time, and not fraudulently made, does not avoid the policy, although the destination be afterwards changed.

ASSUMPSIT on a special policy of insurance. The policy, reciting that the plaintiffs were jointly interested in the

cargo of the ship *Monticello*, and the defendants in the cargo of the brig *Reaper*, on a voyage from *Calcutta* to the *United States*, and that the parties were of opinion, that the premium required by underwriters was greater than the risk, for the purpose of dividing the risk, stated the agreement as follows:—That the plaintiffs should pay to the defendants \$1000, if the *Reaper* should be lost in the said voyage by any of the perils usually expressed in policies of insurance, provided the *Monticello* should arrive at a port of discharge in the *United States*; and that the defendants should pay to the plaintiffs the like sum, if the *Monticello* should be lost in the voyage, by any of the like perils, provided the *Reaper* should arrive at a port of discharge in the *United States*. The parties farther agreed, that the vessels' stopping at the usual places of refreshment should not be deemed a deviation; nor should either party be liable, if the vessel of the other party should be seized before leaving the anchorage in *Calcutta*; nor for any partial loss or damage, but only for a total loss, actual or constructive, according to the law of insurance.

The declaration alleged a loss by capture, and by perils of the seas. Upon the trial it appeared in evidence, that the plaintiffs, who reside in *New York*, employed their agent to effect the policy with the defendants and other shippers in *Boston*, and that policies were finally effected, on the 19th of January, 1813, in the same form, to the aggregate amount of \$10,000. During the negotiation, various propositions passed between the parties, and various letters between the plaintiffs and their agent.

In the first letter of the plaintiffs (29th December, 1812) to their agent, proposing the insurance, it is stated, that the ship *Monticello* was to sail from *Calcutta* in all August, agreeably to a letter of the captain, of the 14th of July; that by information the *Reaper* was to sail in Sep-

tember or October ; that they wished the insurance to be effected with a warranty against a knowledge of war in *Calcutta*, and permission given for the vessels to stop at the *Cape* and *St. Helena*. These instructions and statements were shewn to the underwriters.

The letter from the captain, of the 14th of *July*, 1812, after stating the proceedings of the voyage, and the general expectation at *Calcutta*, that a war had taken place, or would take place, between *Great Britain* and the *United States*, and that no insurance, owing to that expectation, could be effected there, proceeds:—"Let the insurance be at and from *Calcutta* to *New York*, with the privilege of stopping at the *Cape* and at *St. Helena*;" and again, "I shall proceed from this directly to *New York*, the stoppages before alluded to excepted;" and afterwards he adds, "I may not stop at either of the above places, of course there will be a return premium. I shall sail in all *August*."

In another letter of the plaintiffs to their agent (13th of January, 1813) the purport of this letter was stated in answer to some general inquiries made by the request of the underwriters. There was contradictory testimony as to the fact, whether this letter was communicated to the underwriters or not.

The *Monticello* sailed in *August* from *Calcutta*, went into the *Cape of Good Hope*, as it was alleged, in distress, and was there seized as prize of war, and finally, on the 7th of *July*, 1813, was condemned. Due notice of the loss was given to the underwriters.

It was admitted, that the *Cape* and *St. Helena* were usual places of refreshment in the voyage.

The defence, at the trial, turned on two points:—1. That there was a concealment of the purport of the letter of the 14th of *July*, material to the risk, in as much as it

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disclosed an intention of stopping at the Cape, by which condemnation would have become almost inevitable. 2. That there was a misrepresentation of material facts and information in the possession of the plaintiffs, which had been called for by the underwriters.

The cause was argued by *Prescott* and *Gorham* for the defendants, and by *W. Sullivan* and *Hubbard* for the plaintiffs.

STORY, J. after summing up the facts, and advising the jury to find a verdict for the plaintiffs on the facts, if they were satisfied, that there had been no concealment or misrepresentation, proceeded:—

If, on the point of concealment, the jury are satisfied, that the substance of the letter of the 14th of July was not communicated to the underwriters, and that it would have materially enhanced the premium, it becomes my duty to declare the law applicable to this point. It is incumbent on the assured to disclose all facts in his possession material to the risk, which are not contained or implied in the policy itself. But he may be innocently silent as to facts, which the policy necessarily imports. If the policy authorize the ship to stop at a particular port, it is not necessary for the assured to disclose, that the ship will call there, although he has information of the fact. The underwriter, in such a case, takes upon himself the chance of her stopping; and he cannot but know, that the permission to stop implies a chance or probability of its being done, and he estimates his risk accordingly. If he want farther information, he is bound to ask for it; and if he waive any inquiry, he cannot reasonably complain, that the calling at such port was not estimated in his risk. Suppose, at the present time, a policy from *Boston* to any port in *France*; the assured need not disclose to what port he intends sending

his ship, although in consequence of the *Algerine* war, the risk to a port in the *Mediterranean* might materially enhance the premium, beyond that to a port in the *Atlantic* ocean. If the underwriter sign the policy without inquiry, he agrees that the ship may go to any port, which the assured may elect. It would be a different thing, if the assured fraudulently misrepresented the port of destination.¹

The present case, however, does not require so strong a principle. The concealment is stated to consist in the non-disclosure of the contents of the letter of the 14th of July. That letter does not disclose a decided intention to call at the *Cape* or at *St. Helena*. It merely requires, that the insurance should include a permission to stop at these ports without any absolute determination, one way or the other. It seems to have been a measure of extreme caution, to guard against possible events. As the defendants allowed the permission to stop at these ports, I am entirely satisfied, that the non-disclosure of the letter of the 14th of July was not such a concealment, as could, in point of law, avoid the policy. If, therefore, the concealment be made out, the plaintiffs are, notwithstanding, by law entitled to a verdict on this point.

But it is argued, that the underwriters did call for information, and it was not truly given. The call was very general; and when the answer was given, it was not complained of, as not sufficiently precise and special. If dissatisfied, the underwriters were bound to make farther inquiries, and to point out the deficiencies, and not lie by until after a loss, when the assured is no longer able to save himself. General answers are sufficient to general inquiries; and if the underwriters do not insist upon more exact in-

¹ *Saton vs. Low*, 1 *John. Cases*, 1.

The Court called upon the District Attorney to shew, that, upon these facts, there was probable cause of seizure.

Blake, District Attorney, contended, that the mere production of the invoice or passport did not bind the officer, who had no means of knowing whether it was genuine or not. That the merchandise, being on its way from *Vermont*, and such as must have been imported, might reasonably be presumed to have been imported from the British colonies, and as such to be liable to seizure.

But the Court were of opinion, that the facts were not such as to justify the officer in insisting upon a removal of the property to the customhouse in *Boston*, though it might have been reasonable, that the property should be placed in a neighbouring store, until the genuineness of the certificate could be ascertained.

STORY, J. directed the jury as follows :

In order to maintain this indictment, it is necessary that the resistance or impediment to the inspector should be, while he was in the execution of the duties of his office. It is the duty of the inspector to make seizures of goods imported contrary to law, and if resisted in the act of making such seizure, or in securing the property seized, it is a case within the statute. But it is not the duty of the inspector to make any seizures at his arbitrary discretion. He cannot lawfully seize goods, which have been lawfully imported, or which are liable to no reasonable suspicion of illegal importation. To justify him, it is not necessary to shew, that the goods were liable to condemnation; but there must, at all events, be a probable cause for the seizure. Otherwise, the power of an inspector would be most arbitrary and mischievous. It is true, that the law vests him with a discretion; but it is a legal discretion; and he can-

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not protect himself, if he acts wantonly, and without probable cause, for he is then a mere trespasser, and not in the execution of the duties of his office. What constitutes probable cause for seizure is, when the facts are given, a mere question of law, on which the court ought to instruct the jury. It is not a mere question of fact, of which the jury are the sole judges; and, therefore, the court are bound to direct the jury, whether upon the facts, there be probable cause or not. In the present case, I am clearly of opinion, that there is no probable cause shown for the seizure; and that the defendant ought, upon this ground, to be acquitted.

Verdict for the defendant.

UNITED STATES vs. WOOD.

The office of an inspector of the customs ceases with that of the collector who appointed him, and an indictment for resisting such inspector after the resignation of the collector, and before his being reappointed to office by the succeeding collector, cannot be sustained.

INDICTMENT for resisting one *Lewis*, an inspector of the customs, in the execution of the duties of his office, founded on the 71st section of the act of March 2, 1799, ch. 128.¹

At the trial, it appeared that *Lewis* was duly appointed an inspector of the customs by the late collector of *Boston*, since whose resignation he had been reappointed to the same office by the present collector, but the alleged resistance took place after the resignation of the former collector, and before the reappointment of *Lewis*, he having continued to act as inspector under his old commission.

1 4 U. S. L. 391.

The question reserved at the trial was, whether *Lewis* was, under the circumstances, an inspector, against whom the offence could be committed.

STORY, J. The 21st sect. of the act of March 2, 1799, ch. 123^a provides, that the collectors of the customs shall, with the approbation of the principal officer of the treasury department, employ proper persons as weighers, gaugers, measurers and inspectors, at the several ports within their districts. The officers appointed by the collectors under this section hold their offices during his pleasure; and cease to be such upon his death, removal, or resignation, unless the law has enabled him to give more permanency to their offices. In respect to certain officers, the law has provided for the execution of their duties after their principal is out of office. Such, in case of the death of the collector, is the authority vested, by the 22d section of the act, in his deputy. No such provision exists in respect to inspectors. They depend for their employment upon the good will of each successive collector, and in practice it has always been understood, that unless appointed, or, in the language of the statute, *employed* by the collector actually in office, they are no longer officers of the customs.

The indictment, therefore, cannot be sustained, and the defendant is entitled to judgment.

DAVIS, J. concurred.

G. Blake for the United States.

J. T. Austin for the defendant.

United States vs. Briggs.

UNITED STATES vs. BRIGGS.

Quere, whether a piece of cloth, or any other agreed signal, is a pass within the meaning of the first section of the act of 13th of August, 1813, ch. 56.

THIS was an indictment, founded on the act of Congress of 13th of August, 1813, ch. 56, for using a British pass or protection.

The evidence on the part of the *United States* went to prove, that *Briggs* owned and commanded a small boat, which was captured in or near the *Vineyard Sound*, in sight of the British ships of war, having on board vegetables and other provisions of various kinds, and also a piece of *blue cloth*, which was intended to be affixed to the mast-head, as a signal concerted with the enemy, upon seeing which they were to suffer him to pass unmolested.

Much evidence was offered on the part of the accused, to explain or contradict that of the government, but it is unnecessary to state it in this report.

STORY, J. after having summed up the evidence to the jury, directed them ;

That if they believed *Briggs* to have used a patch for the purpose of protection, in concert with a British commander, this was, in the contemplation of the law, a *pass*. It was as much so, as if a ring, or a watchseal, or any other symbol had been given, upon the exhibition of which the defendant would be permitted to go unmolested ; and it was immaterial whether the thing so used was given by the British commander, or was the property of *Briggs*, if it were agreed to be used for this purpose. It was the pass that was granted, and not the thing itself.

The Honourable Judge stated, however, that he did not feel a perfect confidence in this construction of the law, but, as the defendant would have a remedy by a motion for a

new trial to correct any error in this respect, he thought it proper to give an absolute direction to the jury, and to reserve the question for a more deliberate consideration in case of a conviction.

UNITED STATES vs. COOLIDGE.

One, who was not a Quaker, being called as a witness, and refusing to be sworn, on the ground of conscientious scruples arising from a declaration formerly made, was committed for a contempt, the liberty to affirm being strictly confined to *Quakers* by the laws and practice of *Massachusetts*.

The Court has power to discharge the jury empaneled to try the issue in a criminal cause, whenever it is necessary for the purposes of justice—and there is no exception of capital cases.

The grand jury having received testimony of a person not under oath, the indictment was quashed, as irregularly found.

In every case of a motion to the Court for a *cassetur*, the facts, on which it is grounded, must be proved by affidavit.

THIS was an indictment, found at the May term, 1813, for shipping on board of a vessel, called the *Moranda*, fifty barrels of rye flour, with intent to transport the same to *Halifax*, during the war, contrary to the second section of the act of 8th of July, 1812, ch. 129.

In the course of the trial, *William R. Lee, Jr.* who was called as a witness on the part of the government, declined taking the oath usually administered to witnesses, but offered to affirm. When questioned by the Court, he stated, that though he was not one of the religious sect usually called *Quakers*, yet he had conscientious scruples as to the taking of an oath, in consequence of a solemn declaration, which, on some former occasion, he had voluntarily made, not thereafter to take an oath.

He was informed by the Court, that the permission to affirm was strictly confined to those of the society of

Friends; that the law was peremptory, and that, however unwilling the Court might be to adopt so harsh a measure, if he persisted in refusing to be sworn, and the Attorney of the *United States* should not consent to waive his rights, it would become necessary to commit him for a contempt.

The District Attorney, after attempting to proceed without *Lee's* testimony, and finding that, without it, certain papers, material to the prosecution, could not be identified, moved for a commitment.

The Court then ordered a process of commitment, which was issued accordingly.¹

F. Blake, of counsel for *Coolidge*, moved the Court to advise the District Attorney to a *nolle prosequi*, on the ground that the trial could not proceed—but the Court replied, that it was not their practice in any case to advise or control the District Attorney in this respect.

The District Attorney then moved the Court to discharge the jury, and that the cause should remain for trial at a future day.

F. Blake opposed this motion. He admitted, that there were extreme cases, in which the Court had power to withdraw a juror, and continue the cause; but he contended, that in no case had this ever been done on the motion of the government, when on a criminal trial it was deprived of evidence from some unforeseen accident. Had the tables been turned, and had one of the witnesses on behalf of the accused secretly withdrawn himself, no delay or indulgence could have been granted on this account.

¹ He was again brought into Court in the afternoon, and still refusing to testify, was recommitted, but shortly after addressing a letter to the Court, in which he declared his readiness to obey the order of the Court, he was discharged from custody.

STORY, J. The question is simply this: A party is on trial before a jury, and a circumstance occurs, which will occasion a total failure of justice if the trial proceed; have the Court, in such an emergency, power to withdraw a juror? It has been stated from the Bar that, in capital cases, the Court have not this power; but in a case in *Foster's Crown Law*, and in several other cases, it has been held, that they have. In misdemeanors, there is certainly a larger discretion, and until the cases just mentioned, capital trials were generally supposed to be excepted. It is now held, that the discretion exists in all cases, but is to be exercised only in very extraordinary and striking circumstances. Were it otherwise, the most unreasonable consequences would follow. Suppose, that in the course of the trial the accused should be reduced to such a situation, as to be totally incapable of vindicating himself;—shall the trial proceed, and he be condemned? Suppose a jurymen taken suddenly ill, and incapable of attending to the cause; shall the prisoner be acquitted?—Suppose that this were a capital case, and that, in the course of the investigation, it had clearly appeared, that on *Lee's* testimony depended a conviction or an acquittal; would it be reasonable that the cause should proceed? *Lee* may, perhaps, during the term, be willing to testify. Under these circumstances, I am of opinion, that the government is not bound to proceed, but that the case be suspended until the close of the term, that we may see, whether the witness will not consent to an examination. **DAVIS, J.** concurred.

On a subsequent day of the term; **F. Blake** moved that the indictment be quashed, because the grand jury, who found the bill, received the testimony of *Lee*, who was a material witness for the government, without oath, he not being a *Quaker*—and to prove the fact, on which this motion was grounded, he offered *Lee* as a witness.

By the Court. This motion must be supported by affidavit. We cannot receive evidence of matter of fact, in support of a motion to quash, otherwise than in writing, as there could not then appear on record any ground for the exercise of the discretion of the Court. *Coolidge* must also himself make affidavit, that he believes the fact to be as stated.

The affidavits were produced accordingly.

The District Attorney read the affidavits of the marshal and his deputy, stating, that they recollected *Lee* to have been present among the witnesses for the government, at the term at which the indictment was found, and were strongly impressed, that he was sworn; but they could not say positively, that he held up his hand.²

By the Court. *Lee's* affidavit is direct and positive, as to a fact, of which he could not be ignorant. The counter affidavits are merely of impressions. The Court must be governed by the rules of evidence, and the facts must therefore be taken to be as stated by *Lee*. Of the law arising upon these facts there can be no doubt. The grand jury is the great inquest between the government and the citizen. It is of the highest importance, that this institution be preserved in its purity, and that no citizen be tried, until he has been regularly accused by the proper tribunal. Every indictment is subject to the control of the Court, and this indictment, having been found irregularly, and upon the mere statement of a witness without oath, which was not evidence, a *causetur* must be entered.

² This is the usual ceremony of taking an oath in *Massachusetts*.

Arabella and Madeira.

Mem. It was ordered by the Court, that in future a record should be kept of every witness sworn to go before the grand jury, and that the foreman should also return a list of the witnesses examined.

THE ARABELLA AND THE MADEIRA.

The prize courts of a belligerent may take jurisdiction of property captured by its cruisers, while such property is lying in a foreign neutral port.

It is the duty of captors to bring in the master of the captured ship, and the ship's papers. An omission to do this must be fully and satisfactorily explained to the Court, otherwise it will withhold condemnation.

The removal of prize goods is an irregularity, but is indulged under certain circumstances.

How far the want of regular evidence may be supplied by the affidavits or written declarations of the captured.

Of the mode of sale and distribution, in case of condemnation, of prize goods lying in a foreign neutral port.

THE British ships *Arabella* and *Madetra* were captured, in June, 1814, by the private armed brig *Rambler*, *Edes* commander; and thirty boxes of medicines, sixteen bales of piece goods, five boxes of opium, and seventy-five casks of Madeira wine, parcel of their cargoes, were removed on board of the *Rambler*, carried into the port of *Canton*, in *China*, and there landed.

On the 7th day of April, 1815, a prize allegation was filed in the District Court against the same goods and merchandise, praying condemnation thereof as enemies' property, while lying in the neutral port of *Canton*. The usual motion having been returned, at the hearing of the cause, certified copies of the affidavits of the master and mate of the *Arabella*, sworn to before the American consul at *Canton*, were produced, in which there was a most explicit avowal, that the whole property was British. Certified

Arabella and Madeira.

copies of the written declarations of the master and mate of the *Madeira*, drawn up and signed at sea after the capture, were also produced, in which were contained similar avowals. No ship's papers, or documentary evidence of property, had been lodged in the registry, and the only other evidence in the cause was a copy of the protest of the prize master of the *Arabella*, stating the circumstances of her subsequent recapture by the British.

No claim having been interposed in the District Court, a *pro forma* decree was rendered, from which the captors appealed to this Court.

A. Townsend, for the captors, now moved the Court, upon the evidence above stated, to proceed to condemnation. The Court having taken time for advisement, the following opinion was delivered by

STORY, J. The first question, which presents itself, is, whether the Court has jurisdiction to proceed to the adjudication of prize property, lying in a foreign neutral port. This question has been discussed with much ability and learning in the admiralty courts of *Great Britain*, and has there been finally settled in the affirmative, not so much upon the supposed correctness of the principle, as the general usage of nations. It was there admitted, that condemnation of prize property, lying in the ports of an ally in the war, was strictly justifiable; but it was thought, that a different rule might apply to neutral ports.¹ In the courts of the *United States*, the question has received a solemn decision, and it has been held, that upon principle a condemnation of a prize, lying in a neutral port, is valid, and may be rightfully decreed by the prize jurisdiction.² And the

¹ *The Henrick and Maria*, 4 Rob. R. 43.—*The Christopher*, 2 Rob. R. 207.—*The Victoria*, 1 Edw. R. 97.—*The Comet*, 5 Rob. R. 285.

² *Hudson vs. Guestier*, 4 Cranch, R. 293.—S. C. 6 Cranch, R. 281.

correctness of this decision is evidently presupposed in several provisions of the prize act.³ If, therefore, I felt any lurking doubts on the subject, I should feel myself bound by authority. But I am free to declare, that, after much reflection, I am entirely satisfied, that the doctrine is founded in national law.

The next consideration is, whether the Court ought now to proceed to adjudication, in the absence of the regular testimony and documentary evidence, required in prize causes. The court always demands from the captors a compliance with the requisitions of the prize statute and the public instructions; and watches, with great jealousy, every deviation from them. Whenever such deviations occur, the court requires the most satisfactory proof, that they were unavoidable, or at least justified by very cogent and pressing reasons. It is an ancient and fundamental rule of prize proceedings, enforced by the President's instructions, that the master of the captured ship should be brought in and examined upon the standing interrogatories, and that the ship's papers should accompany the property brought before the court. I do not say that the rule is inflexible, for cases may and do occur, in which the omission has not been allowed to work any injurious consequences. But the omission must be accounted for in a satisfactory manner, or the court will withhold its sentence even in very clear cases.⁴

The transaction, indeed, in the present case, having taken place in a remote part of the world, the absence of the regular testimony of the enemy's masters may be easily accounted for; and, under such circumstances, I should have no difficulty in admitting their affidavits, taken before some proper authority in the neutral country. Such a

³ *Act 26 June, 1812, ch. 107, s. 6.*

⁴ *The Anna, 5 Rob. R. 373, and note (a) p. 385, f.*

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proceeding is by no means unusual.⁵ But here even such original affidavits are not produced. Copies only are offered of the affidavits and certificates of the enemy's masters and mates, and no reason is assigned for the non-production of the originals. In respect to the certificates of the master and mate of the *Madeira*, there is this farther objection, that they gave them while they were at sea, as prisoners, on board of the capturing ship. Nor is there any reason assigned, why their testimony was not afterwards taken, as was done in the case of the *Arabella*. Certainly, the certificates of hostile persons, while prisoners of war on board of an enemy's ship, are liable to some suspicion, for they may have been procured by duress or by fraud. I do not mean to suggest any doubt of the purity of the transaction in the present case. On the contrary, I have many reasons to presume it to have been entirely fair. But the Court would surrender all its discretion, if it could permit captors to act with such irregularity, and not require a plenary explanation of the manner, in which it happened, and of the circumstances which may excuse it. It would hold out temptations to gross misconduct in captors, and subject the prize tribunals to unjust accusations of connivance in breaches of national law. Our duty also, in respect to the interests of neutrals, requires us to act with caution, and to afford no just pretext for dissatisfaction in administering the maritime rights of war.

There is another irregularity, which indeed has become so general in practice, and has so far obtained the silent acquiescence of public opinion, that it seems almost to have been thought to have ripened into a right. I allude to the removal of the goods from prizes on board of the capturing ship. This is in direct contravention of the express provisions of the prize act, which require, that before bulk is

⁵ *The Peacock*, 4 Rob. R. 185, 191.

broken, or the prize property is otherwise disposed of or converted, it shall be brought in and proceeded against before some competent tribunal. This provision was undoubtedly designed more immediately for the security of neutrals; but it is also a useful restraint, even as to enemy's property, in as much as it has a tendency to prevent embezzlements and frauds, and to aid the regular operation of the revenue laws. In relation, however, to neutrals, it is of the highest importance; as their property, especially on board of enemy's ships, would otherwise be liable to every species of hazard, and often to irremediable ruin. Courts of prize are therefore bound to hold the captors to very strict scrutiny, whenever cases of removal of goods occur, and to take every precaution to guard against the abuses growing out of the practice. I do not say that a removal is in no case to be allowed, unless of necessity, though perhaps the prize act might, at first view, seem to warrant that rigorous construction. In point of practice, however, even in the British courts, where a similar statutable direction exists, a more indulgent rule has been adopted. Where property has been captured on a remote station, or under circumstances calling for a removal, sale or other conversion, or even a delivery on bail, on the ground of some great inconvenience, the act has been held valid upon the proper explanations being made, and condemnation has been pronounced in favour of the captors.*

In respect to our own country, considering the character of the war, in which we have been engaged; the great naval force of the enemy; and the consequent difficulty of bringing prizes into our ports; it has not been thought unreasonable to hold, that a removal of prize goods into the capturing ship, if not strictly justifiable, is at least excus-

* *The Peacock*, 4 Rob. R. 185, 191.—*L'Eole*, 6 Rob. R. 220, 224.—*La Dame Cecile*, 6 Rob. R. 257, 260.—*The Falcon*, 6 Rob. R. 194, 200.

able. I trust it is no want of proper decorum to assert, that this conduct seems to have received the favourable consideration even of the government itself. It has been deemed consistent with the national policy, to interpose no obstacles to such proceedings; and to leave the courts of law to make the most liberal interpretations in such cases, in favour of the captors. Under these circumstances, a uniform practice has prevailed in all the courts of the *United States*, to proceed to adjudication of prize property without any other regard to the fact of its transshipment, than as it called for a most exact examination of the proprietary interest. Still, however, after every indulgence, the transshipment is deemed an irregularity, and at the peril of the captors, who become ultimately responsible to the court for all its consequences.

I have thought it proper to state thus much, in order to vindicate the Court from the imputation of lending its aid to great irregularities without reasonable cause. In every case, what shall be the effect of any irregularity must depend upon the sound discretion of the court, acting upon an enlarged and liberal policy. Cases may occur of such gross misconduct, that it might be proper to apply the penalty of a forfeiture of the right of the captors to the *United States*. I profess not to see in the present case any circumstances, which may not entitle the parties to the most benign indulgence of the Court.

What I shall at present do is, to suspend judgment, and to require of the captors affidavits of the facts, which shall explain the irregularities, to which I have alluded.⁷

⁷ On a subsequent day of the term, the affidavit of the commander of the *Rambler*, stating the circumstances, having been produced, condemnation was decreed. A sale was ordered to be made under the direction of the Court. It was stated, that any mode of sale, that might be agreed upon by the captors, would be sanctioned by the Court. And that, upon receipt of an account of sales, it might be filed in court, and distribution would be decreed accordingly.

Flying Fish.

THE FLYING FISH, CAUTION MASTER.

All goods found on board of an enemy's ship, are presumed to be the property of the enemy, unless a distinct neutral character is impressed upon, and accompanies them.

It is a great irregularity for the captors not to bring in the master, or some principal officer of the captured ship, and this, combined with other circumstances, will sometimes induce a condemnation to the *United States*.

Indulgence to captors, who had released the master from motives of compassion.

If the shippers in a *hostile* ship neglect to put on board any documentary evidence of its neutral character, they will not be allowed the benefit of farther proof.

THIS was the case of a British vessel, captured on a voyage from *London* to *Trieste*, by the private armed schooner *David Porter*, *Fish* commander. Though the cargo was very valuable, there was no paper found on board, which declared its national character or proprietary interest. The only papers produced were the ship's register, the manifest, cocquets of the shipments, and bills of lading. The latter did not state on whose account or risk the shipments were made, and, with a single exception of a consignment to order, they were all consigned to persons at *Trieste*, whose national character was not even surmised.

STORY, J. (after reciting the facts.) Under these circumstances, there can be little doubt, that the property must be deemed hostile. It is a general rule of the prize law, that all goods found on board of an enemy's ship, are presumed to be the property of the enemy, unless a distinct neutral character is impressed upon and accompanies them. "Res in hostium navibus præsumuntur esse hostium donec contrarium probetur."¹ If a neutral will ship his goods

¹ *Loccenius. Lib. 2, cap. 4, n. 11. Grotius de Jure B. and P. Lib. 3, cap. 6, s. 6.—Bynk. Q. J. P. Lib. I. cap. 12.*

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in an enemy's ship, he is bound to send with them such documents, as shall clearly evince their neutral character. If he neglect so to do, he justly incurs the penalty of forfeiture. Any other course would subject the prize tribunals to endless impositions and frauds; and enable the enemy, by suppressing the documentary evidence of his ownership, to obtain in all cases the benefit of farther proof, and to evade the just rights of cruisers.

In the present case, considering the number of shipments, it is almost incredible, that there should not have been some invoices and letters of advice on board; and it is quite as difficult to believe, that the whole cargo was neutral. The only possible explanation is that asserted to have been made by the master, that the invoices and letters were transmitted by land to *Trieste*; and this, if true, affords an irresistible presumption of the hostile character of the cargo.

Under these circumstances, I should not have felt the slightest hesitation in pronouncing a decree of general condemnation, if it had not been for a very great irregularity on the part of the captors. I refer to the omission to bring in the master or mate of the *Flying Fish*. The only witnesses, brought in and examined on the standing interrogatories, were one seaman and the cook, neither of whom has spoken, nor could in the nature of things be presumed to speak, to the ownership of the cargo.

It is matter of surprise, that, at so late a period in the war, captors should have been so ignorant of their duty, as to suppose, that they were at liberty to discharge the officers of the ship, without any examination before the prize court; or so negligent, as to suppose every frivolous pretence would authorize them to omit it. It is an imperative rule of the prize court, that the master, or other principal officer of the captured vessel, should be examined in pre-

paratory, to testify to the proprietary interest of the vessel and cargo. This rule, so indispensable to the regular execution of judicial authorities, is one of the last, which this Court has been disposed to relax since a reasonable time has elapsed after the war, to enable the captors to understand the nature of their duties. The rule is also enforced, in the most positive manner, by the President's instructions, accompanying the prize commission. The absence, therefore, of the regular evidence, cannot but awaken suspicion; and, in some cases, would induce the Court to apply heavy penalties against the captors. Cases have even occurred in this Court, in which this omission, combined with other circumstances, has afforded such a conclusive presumption of fraud, that condemnation of the property has been adjudged in favour of the *United States*. In the British Prize Courts, the omission has been reprovved in a very severe manner, and sentence of condemnation has been withheld, even in the clearest cases, until it has been supplied, or satisfactorily accounted for.²

The affidavits, brought in by the captors to account for this omission, disclose a very humane motive, but certainly form no legal justification or excuse. The master, or chief officer, ought to have been left on board of the prize, and it was a great irregularity to remove both of them. Taking it, however, as a case of compassion, I am disposed to adopt a more indulgent course, than I should otherwise have pursued. In no event should I have allowed farther proof; for the owners of the property, whether neutral or hostile, had, by suppressing, or omitting to put on board, any documentary evidence of property, completely forfeited all title to relief. The most, that could in their favour have been allowed, would have been to suspend a decree for a year

² *The Speculation*, 2 Rob. R. 293—296.—*The Anna*, 5 Rob. R. 373, and 385 *f. note (a.)*

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and a day, to give opportunity for proof of any misconduct on the part of the captors in dismissing the master.

Having no doubt, that the property in the present case belonged to British subjects, I shall condemn the whole, as good prize to the captors.

G. Sullivan and *G. Blake*, for the captors.

THE BETSY AND CARGO, STOUGHTON, SPANISH CONSUL, CLAIMANT
FOR MAURY AND COMPANY.

Where a captured cargo belonged, one half to a neutral, and the other half to an enemy, and there were papers on board, from which the enemy's interest might be discovered, it was held, that the share of the neutral should not be subjected to confiscation, in consequence of his having persisted in a claim for the whole made by his agent, nor of his having sworn falsely, that he was solely interested; such affidavit not having been employed for any fraudulent purpose in the cause, and not having been filed, until after an order for farther proof had passed, as to one moiety, and a decree of condemnation had by consent been entered against the other moiety.

If a neutral fraudulently attempt to cover and claim an enemy's interest in a prize court, he will not be permitted to introduce farther proof, to shew his own neutral interest in the same property.

A court of prize will never busy itself in unravelling a web of fraud, to aid a party who has sought to impose upon it.

THE *Betsy*, a British vessel chartered by *Maury* and *Co.* of *Malaga*, was captured on a voyage from *Malaga* to *St. Petersburg*. No invoice was found on board. The bill of lading expressed the cargo to be shipped by *Maury* and *Co.*, consigned to order, without declaring on whose account and risk. The master, in his answers to the standing interrogatories, affirmed the cargo to be, as he believed, the sole property of *Maury* and *Co.*, excepting some few articles, which belonged to himself. He farther stated, that he was to deliver the cargo at *St. Petersburg* to any person, who should produce a bill of lading.

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From a letter on board, written by *Maury and Co.* to *Amberger and Co.* of *St. Petersburg*, and dated April, 1813, it appeared, that the cargo was "on joint account with a *London* house"; and there was also a memorandum, apparently written by the captain, in the words following:— "Instruction.—That any merchants at *St. Petersburg*, producing me the bill of lading for the cargo now on board, shipped by *Maury and Co.* of *Malaga*, which I left in the hands of *Mr. Osman*, signed on the back *Maury and Co.*, with other directions from the house in *London*, will be entitled to have the cargo delivered to them."

The whole cargo was claimed, as the property of *Maury and Co.* by the Spanish Consul, before any knowledge on his part of the interest of the British house. Upon the evidence of the papers on board and the preparatory examinations, the District Court, in October, 1813, decreed condemnation of one moiety of the cargo, as enemies' property. As to the other moiety farther proof was ordered. In September, 1814, a *pro forma* condemnation was decreed, as to the moiety ordered for farther proof, and an appeal was thereupon interposed to this Court, the claim to the other moiety having been abandoned by the counsel for the claimants.

In January, 1814, *Maury and Co.* wrote to the Consul, stating themselves to be the sole owners of the cargo, and transmitting an invoice supported by an affidavit of one of the firm, expressly declaring the property to be exclusively, in them. This paper was not produced in court, until after the claim as to the condemned moiety had been abandoned, nor was any use made of it on the part of the claimants.

The evidence taken under the order for farther proof was now produced. It consisted of sundry letters between *Maury and Co.* and *Reeves and Co.* of *London*, which disclosed the whole history of the transaction, and clearly

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proved the Spanish and the British houses to have been, from the outset, equally interested in the adventure.

Blake, District Attorney, for the captors. 1. There is no evidence of the neutrality of any part of the cargo. The farther proof now introduced might be sufficient for that purpose, were not its credit entirely destroyed by the fraudulent conduct of the claimants. *Maury* and *Co.* having been informed that the whole had been claimed on their behalf, and supposing, no doubt, that no proof of British interest had appeared, declare, under the solemnity of an oath, that the whole belonged to them. This affidavit they send to the Spanish consul, supposing him ignorant of the transaction, in order that it may be palmed upon the Court. The credit of the farther proof rests entirely upon *Maury's* oath, and he is not to be believed after such prevarication. 2. Here has obviously been an attempt to cover enemies' property. It is a duty to have on board papers shewing distinctly to whom the property belongs. There was no document on board, from which the interest of the English house could be discovered. There was, it is true, a sealed letter stating the fact, and there was a short memorandum, which contained some hint of it. But these formed no part of the ship's papers, nor were they intended to be mixed with them, but to be kept in the captain's pocket. It was by accident only, that they came into the hands of the captors. Such attempted concealment, on the part of the neutral, involves the confiscation of his own property. He is not permitted, after a detection, to say, "I did indeed attempt to cover the whole, but so much is really my property." 3. The captain has asserted the whole of the property to belong to *Maury* and *Co.* He must be supposed to know, for he is bound to know to whom the pro-

¹ *The Encom, 2 Rob. R. 1.*

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perty belongs. There must always be some person on board, who is acquainted with the truth of the transaction; and, there being no supercargo, that person must, in this case, be presumed to be the captain. His knowledge may also be inferred from the memorandum, which has been read. That the false swearing of the captain involves the property under his charge appears from the case of the *Shepherdess*.²

4. Admitting that *Stoughton's* claim alone would lead to no penal effect, yet there is here a complete ratification on the part of *Maury and Co.*, and the case is, therefore, to be viewed in the same light, as if the claim had been made by themselves. *Omnis ratihabitis retro-trahitur*. The letter from *Maury and Co.* to *Stoughton* thanks him for his interference, and forwards the affidavit, evidently with an intent that it should be used in support of the claim. If, then, the claim is to be considered as the claim of the principal, the property must be condemned upon the principles of the cases cited. The neutral, having falsely claimed the whole, is not allowed to abandon a part, and claim the residue.

Prescott and *W. Sullivan*, for the claimants. The papers, from which it has been attempted to infer fraud and falsehood on the part of the claimants, were filed while the counsel were ignorant of the real state of the transaction, and merely to comply with a suggestion from the Court below, that some proof should be furnished of property in the neutral claimants. They were not papers found in the vessel, nor regularly admissible in the cause. No use has in fact been made of them. They were not filed until after the order for farther proof had passed, and then only

² 5 Rob. R. 262.

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de bene esse, and as matter of form. They are entirely superseded by the farther proof now received, and should, therefore, be taken out of the cause. The case then presents a fair commercial transaction, the origin and all the circumstances of which are disclosed to the Court.

[*STORY, J.* The letter and affidavit having been on file, the captors have a right to use them, subject, however, to any explanation, which the other party may offer.]

It is clearly proved, that, in the origin of the transaction, one half of the cargo belonged to the neutral. The only question then is, whether the neutral has forfeited his right by any misconduct? This question may be considered, 1. As to the effect of the papers found on board. 2. As to the effect of the papers since introduced into the cause.

1. The penalty of confiscation is confined to cases, where there is nothing on board, which can lead the court to a knowledge of the enemy's interest. Such was the case of the *Eenrom*. But in the case before the Court, no paper on board is contradicted by the evidence now introduced. The form of the bill of lading is far from being an uncommon one. It might be explained from the invoice. It is said, indeed, that no invoice was found on board. If so, the reason is obvious. The selection of the consignee at *St. Petersburg* being left to the *London* house, the invoice was sent to them, together with the bill of lading, which the master left in the hands of one of the house of *Maury and Co.* For the same reason the cargo was addressed to order generally.

[*STORY, J.* Was it not the duty of the neutral to put on board such evidence, as would enable the master to state the enemy's interest?]

Hearsy.

A mere negligence or omission will not subject the neutral to the severe penalty of confiscation. Where he deliberately attempts to cover enemies' property, and there is nothing on board, by which the enemy's interest could be detected, he is not allowed to offer evidence in contradiction to the original documents. He cannot shew, that the character given to the whole was false only as to a part. But this is not the present case. There was here no designed concealment. There were reasons sufficient for not instructing the master as to the property in the cargo. He was a stranger. It could not be presumed, that he was to be examined. He had, besides, no other connexion with the cargo, than to carry it to *St. Petersburg*, and there deliver it to persons pointed out. No injury has been done to the cruiser, for in fact no cruiser ever relies upon the information of the captain. Had the captors examined, the letter of the 27th of January could not fail to disclose to them the real nature of the transaction; and the enemy's interest in a part of the cargo. The existence of such a letter on board, which there does not appear to have been any attempt to conceal, is the strongest possible evidence, that no fraud was intended.

There were, therefore, documents on board, which fully disclosed, that a part of the cargo belonged to a British owner. In the captain's memorandum, no attempt is made to keep out of sight the *London* house.

2. Has any thing been done by the neutral since the sailing of the vessel from *Malaga*, which can subject the cargo to forfeiture? No irregularity committed out of court can be a cause of confiscation. The reason for this penalty, generally, is, that the papers are such as to deceive and mislead the cruiser. If, on production of farther proof, there be an irregularity, or even an attempt at fraud, still, if enough appears to shew the property to be as claimed,

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confiscation will not follow. Now, the declaration of one of the partners attached to the invoice, is no part of the documentary evidence. Indeed it is not evidence of any sort, being only the voluntary declaration of the party.

[*STORY, J.* If this paper be admissible at all, it must be as an affidavit supplementary to the claim; for though an agent may claim, yet if sufficient time intervene, the principal must support it by his affidavit.]

Had this paper been found on board, the consequences must have been highly penal. But, in the manner in which it has been now produced, it can have no influence on the cause.

[*STORY, J.* The only question of difficulty in this case is, whether, it appearing to the Court, that the neutral has a right, this false declaration shall induce the Court to shut out the evidence? Had this declaration appeared among the ship's papers upon the original hearing, farther proof would, no doubt, have been refused. It is well settled, that the neutral shall not be permitted to introduce evidence to shew a right to part, after having fraudulently attempted to obtain the whole. But, if the evidence is introduced, and the right of the neutral appears, can a false declaration of this nature defeat its effect?]

Prescott. The court attends to no irregularity or iniquity, but such as relates to the cause. It is not the making of the invoice in *Malaga*, or swearing falsely to it there, that could induce confiscation, but the effect and use of it here, to deceive and impose upon the court. But in fact no use whatever has been made of it, and it is, therefore, to be entirely disregarded.

STORY, J. This is the case of a British ship, captured on a voyage from *Malaga* to *St. Petersburg*. One half of the cargo has been condemned as enemies' property; and the other moiety was ordered for farther proof in the District Court, having been claimed in behalf of Messrs. *Maury and Co.* of *Malaga*. The farther proof has now come in, and the cause is to be decided upon its merits.

The preparatory examinations asserted the whole property to belong to Messrs. *Maury and Co.*; but there was a letter on board, which clearly narrowed their title to a moiety. The whole cargo was, notwithstanding, claimed by their agent, and that claim, as to one moiety, was not abandoned until the appeal to this Court at October term, 1813.

In January, 1814, an invoice of the property, with an accompanying letter and affidavit, was forwarded by Messrs. *Maury and Co.* to their agent in the *United States*, and at May term, 1814, these papers were regularly filed in the cause. In that affidavit, invoice and letter, the whole property is explicitly asserted to belong to Messrs. *Maury and Co.*, and not the slightest intimation is given of any hostile interest. Indeed, Messrs. *Maury and Co.* appear at that time to have been ignorant, that their counsel had abandoned the claim of one moiety, as utterly indefensible.

The farther proof, which has been brought in at this term, under an order made in the District Court, shews incontrovertibly, that Messrs. *Maury and Co.* were not owners of more than one moiety of the cargo, and that the other moiety belonged to Messrs. *Reeves, Bell and Co.* of *London*. This proof would, in ordinary cases, have been deemed entirely satisfactory; and the only difficulty arises from the gross falsity and fraud of the invoice and affidavit originally furnished by Messrs. *Maury and Co.* respecting

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their proprietary interest. "*Falsus in uno, falsus in omnibus*," is a maxim of sound morals, as well as of distributive justice.

If these fraudulent papers had been originally produced before the order for farther proof, the Court would have felt itself bound to deny it; for it will never trust a person with an order for farther proof, who has already shewn, that he is not only capable of abusing, but has been detected in an attempt to abuse it. And if these papers had been inserted in the cause with a view to support the claim to the *whole* property, I should have held the party bound by his misconduct. A court of prize will never busy itself in unravelling a web of fraud, to aid the party, who has sought to impose upon it. If he knowingly assert and persist in a fraudulent claim, it will affect with forfeiture the whole of his property, which is engaged in the transaction.³ There can be no doubt, that the present claimants intended to defraud the captors of their lawful rights, and to withdraw hostile property from confiscation. That they have failed in the attempt is not owing to any repentance or good will on their part.

Still, however, in point of fact, this dishonourable contrivance was not actually used to the prejudice of the cause. The good sense and intelligence of counsel had induced them, before the arrival of these papers, to consent to an affirmance of the decree of condemnation of one moiety of the property, and thereby prevented the claimants from committing themselves. Until the papers were actually used, there was a *locus pœnitentiæ*. In order to entitle the Court to pronounce confiscation upon the moiety now claimed, by way of penalty for the fraud, there should be a com-

³ *The Eenrom*, 2 Rob. R. 1.—*The Graaf Bernstorff*, 3 Rob. R. 109. S. P. *The St. Nicholas*, 1 Wheat. R. 417.

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bination of intention and act. In this case, the claimants have not, if I may use the expression, been caught in *delicto*. The only possible effect, therefore, that could be attributed to their misconduct, would be to throw a shade of doubt and suspicion over the farther proof now offered to the Court. On examining it, however, I cannot but feel a strong impression, that it contains the real, undisguised transactions between the parties; and as it stands completely corroborated by the original documentary evidence, I shall not hesitate to give it entire credit, especially as it is vouched by the American consul.

I decree restoration of the moiety now claimed by Messrs. *Maury and Co.* upon the payment of the full costs and expenses of the captors.

THE AVERY AND CARGO.

If, upon the ship's papers, it be doubtful, whether the property captured as prize belong to an enemy, it is not usual to proceed immediately to condemnation, although no claim be interposed. But if, in such case, no claim be interposed within a year and a day, condemnation is of course to the captors.

The Circuit Court cannot rehear a cause, or admit a claim, at a term subsequent to that, in which the cause was *finally* decided.

W. SULLIVAN prayed the Court to admit proof of the neutral ownership of a part of the cargo of this vessel, which had been some time since condemned for want of a claim, suggesting that this proof had been obtained from such a distance, as made it impossible to have received it before. The admiralty rule of a year and day, however suited to the courts of *Europe*, where communication may be had with all parts in sixty days, was not, he contended, applicable to a country so remote from many parts of the commercial world, as the *United States*.

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STORY, J. The British brig *Avery* was captured on the 28th of April, 1813, libelled in the District Court on the 28th of July of the same year, and afterwards, upon the hearing in the District Court, the vessel and part of the cargo were condemned as enemies' property. As to the residue, a decree of dismissal was, by consent of the captors, made against them, from which they appealed to this Court, and at October term, 1814, *no claim ever having been, in either court, interposed to any part of the property*, the same was finally condemned to the captors, and distribution ordered of the prize proceeds, which have accordingly been withdrawn from the Registry of the Court.

A motion is now made by counsel, in behalf of certain merchants of *Morocco*, to interpose a claim to said property, and to have the same regularly tried, on an appeal to the Supreme Court. And the question to be decided is, whether the Court can now entertain this motion.

It is an ancient and indisputable rule of the law of nations, "*res in hostium navibus præsumuntur esse hostium, donec contrarium probetur.*"¹ And it is the duty of neutral shippers to put on board the most plenary proofs, to repel this presumption. If they omit it, and a condemnation ensues, it is justly imputable to their own laches.

It is not now usual, in the prize courts, to condemn goods for want of a claim upon the hearing at the return of the monition, except in cases where there is a strong presumption from the evidence, that the property actually belongs to an enemy. If there be probable evidence of a neutral interest, sentence is suspended for a reasonable time, to enable the party to make a claim. That reasonable time has been fixed, by the immemorial usage of the admiralty, to a year and a day. And if no claim is interposed within that

¹ *Locc. Lib. 2, cap. 4, n. 11.*—*Grot. Lib. 3, cap. 6, sect. 6.*—*Bynk. Q. J. P. cap. 13.*

time, condemnation follows of course in *pœnam contumaciæ*.²—Nor is this a mere arbitrary regulation. It is to be found in analogous cases in the common law, as a limitation to the rights of property, in cases of wreck,³ and estrays⁴; in the conclusive efficacy of a judgment in a writ of right, even against strangers, unless they sue within that term;⁵ in the limitation of the effect of a continual claim; in the prescription as to suing appeals of death; and in confining prosecutions for murder to cases, where the stroke and death happen within the same period. It is likewise found applied to similar purposes in the ancient Gothic constitutions.⁶ Above all, it is adopted in the civil law, in the early admiralty ordinances of *France*, in the laws of *Oleron*, and in the *Consolato del Mare*, as a limitation of right in cases of shipwreck, because, as the custom of *Normandy* expresses it, “eo tempore elapso, videtur Dominus habuisse pro derelicto.”⁷ It is highly probable, from this summary history of the rule, that it has been generally received among all maritime nations. (a) At all events, it is a part of the admi-

² 2 *Rob. Coll. Mar.* p. 89.—*Note.*

³ 2 *Inst.* 168.

⁴ *Bl. Com.* 298.—5 *Rep.* 108.

⁵ *Plowd.* 357, a.—*Co. Litt.* 254, b. 262.

⁶ 1 *Bl. Comm.* 298.—4 *Bl. Com.* 315.

⁷ *Cod. Naufragiis, Lib. XI. Tit. 5, l. 2.*—*Peck. ad rem naut.* 889.—*Consol. del Mare, ch. 252.*—*Les Us et coutumes de la Mer, 53, 54.*—*Laws of Oleron, 30.*

[(a) The origin and various modifications of this prescription of a year and day are explained with great copiousness and learning by *Heineccius* in his essay “*De præscriptione annali juris Lubecensis a jure communi diversa*”—(*Opera Minora, Syll. I. Exerc. 26.*) After remarking, that in the codes of all the principal German nations, the day is found superadded, *tamquam auctarium quoddam*, to the year; he proceeds to say (§ 8) that the Germans of the middle age gave the name of *day* to that legitimate delay, which was indulged to every one before making his appearance in Court; and as it was the custom for citations to command an appearance on the fourteenth day, and the party was to be thrice cited before he incurred the sentence of contumacy, this, including the three days assigned for appearance, gave

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ralty law, which this Court is bound to respect; and we are not at liberty, upon any notions of supposed inconvenience, to create a novel regulation. If the present be found unsuitable to our circumstances, as a maritime power, it will be for the legislature to devise a more just and equitable rule. *Stare decisis* is a great maxim in the administration of the law of nations.

In the case at bar, although no claim was interposed, condemnation was not finally pronounced, until about sixteen months after the prize proceedings were first instituted—and it was upon the footing of the general rule, that the sentence was then passed. That sentence has been completely executed, and a distribution made; and this Court can have no more jurisdiction to revive or review the cause, or to sustain the present application, than it can have to adjudicate upon any other cause, which has been determined within twenty years.

The Supreme Court have refused to rehear a cause at a term subsequent to that, in which it was determined, being of opinion, as I well recollect, that the cause was no longer

six weeks and three days, which period was denoted by one word "day."—Thus, if we may believe *Heineccius*, the "year and day" (*annus et dies*) originally signified a much longer period, than it is now thought to comprehend. He adds, however, that in the laws of *Lubec*, which he was examining, the word "day" means not six weeks and three days, but twenty-four hours only, and accordingly the prescription, which in *Saxony* extended to four hundred and ten days, was in *Lubec* confined to three hundred and sixty-six.—From the same writer (§ 17) it appears, that by this law the property both of real and personal things was lost, if not asserted within a year and day. In this respect, it differs from the civil law, which allows a much longer time for immoveable, than moveable property. By the law of *Lubec* the prescription did not begin to run against absent persons, until they had knowledge of the event. But the civil law, in respect to moveable things, granted no indulgence to the absent. (§ 18) According to the French Encyclopedia (*Jurisprudence—An et Jour*) the day was added to the year, to avoid the difficulty of deciding whether the last day should or should not be included in the term. Much learning upon this subject, and an enumeration of several examples from the common law, will be found in *Spelman's Glossary*, 32.]

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*coram judice.*⁹ It has also affirmed the doctrine, that where no claim is interposed for prize property, condemnation must go to the captors.

If, therefore, the present motion could be granted, it would be of little avail to the parties. But it is utterly incompetent for this Court, sitting as such, to grant an appeal in a cause, which is no longer within their cognizance. The motion must be overruled.⁹

W. Sullivan for the promovents.

⁹ *Hudson vs. Guestier*, 7 Cranch, R. 1.

⁹ In *The Harrison*, 1 Wheaton. R. 298. the doctrine of this case as to the year and a day was directly affirmed by the Supreme Court.

REGULA GENERALIS.

THE following was added by the Court to the fifty third article of the standing rules of practice :—

In vacation, either party may have a commission to take evidence, on application to either of the Judges of the Court, in like manner as in term.

CIRCUIT COURT OF THE UNITED STATES.

RHODE ISLAND, JUNE TERM, 1815, AT NEWPORT.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
 { Hon. DAVID HOWELL, District Judge.

THE FRANCIS AND CARGO, BOYER MASTER, LOW & CO. CLAIMANTS.

If a shipment be made without, or contrary to orders, it still remains at the risk of the shippers. If a shipper have general discretionary orders to ship goods, the shipment will remain at his own risk, unless at the time of shipment, by some overt unequivocal act, he designates or appropriates the shipment to his correspondent. Until such appropriation, the property is not changed.

STORY, J. This is a mere question of proprietary interest. The shipment was made by Mr. *Bowman Fleming* of *Glasgow*, to his brother, Mr. *John Fleming* at *New York*. The packages are all marked with the initials BF, but neither the bill of lading, nor invoice, nor accompanying letter, express any account or risk. The natural conclusion would be, that the property belonged to the shipper. The claimants, who are merchants at *Savannah*, claim the shipment on their own account, and upon their urgent application, an order for farther proof was made, and the original letters and documents respecting the shipment were required to be produced. They have had full warning of

the extreme difficulty of their case, and ample time to remove it ; and it must now be presumed, that every thing is before the Court, which they could call in aid of their claim.

Considering the nature of the claim, the evidence adduced is not so complete, as might have been reasonably expected. There are several omissions, which it is very difficult to account for, and a considerable degree of laxity in the statements of the affidavits of claim.

No specific orders are produced, to authorize the shipments ; and the orders, contained in the letter of the 21st of December, 1811, would seem directly to negative it. It is a clear result of the decisions of the Supreme Court,¹ that a shipment made without orders, or contrary to orders, is at the risk of the shipper during the voyage. The claimants attempt to support their case under the allegation, that the shipper had general discretionary orders to ship, what and when he pleased, and that there was a sort of general usage between him and them on the subject. It strikes me, that there is no sufficient evidence, to justify so broad an allegation. And if there were, in point of law, the shipment would remain at the risk of the shipper, unless at the time of the shipment, he, by some overt unequivocal act, designated or appropriated it to his correspondents. He cannot ship goods generally to a third person, and govern himself as events may turn up, either to claim the gain for himself, or to throw the loss on them. Until such appropriation, the property is not changed. It might, with as much propriety, be claimed as changed, when ordered from the manufacturers on the general account of the shipper, merely because he had a contingent intention of shipping

¹ *The St. Joss Indiano*, 1 *Wheaton's R.* 208, and cases there referred to.

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it to his correspondents. And this also, as I apprehend, has been the doctrine asserted by the Supreme Court.

In the present case, there is not a scrip of paper on board pointing to an interest in the claimants. If really designed for them, it is inconceivable that no letter, ordering the transshipment to *Savannah*, was sent to the consignee. No original letters to Mr. *John Fleming* are produced; and although the parties, from being brothers, cannot but be presumed to have an intimate connexion, (a connexion palpably admitted in all the letters of a confidential nature,) there is not a line from Mr. *Bowman Fleming* to him, nor even an affidavit from Mr. *John Fleming*, to negative the presumption necessarily arising from the consignment. This gentleman has studiously withdrawn himself from all connexion with the cause, though from his residence at *New York*, it is difficult to conceive, why he should not have originally interposed a claim as consignee, if there had been the slightest pretence for a *bona fide* claim. It is impossible not to draw very unfavourable inferences from this sedulous omission of a necessary witness, who may be really deemed *conductor operarum*. I have a strong impression, corroborated by some of the letters, which are in the case, that if the confidential correspondence and articles of copartnership of the parties, were fully before the Court, it would appear that Mr. *Bowman Fleming* was either a dormant partner, or a principal, in all the shipments made by him to the houses at *Savannah* and *New York*.

There is another important omission. In the letters produced, there is a perpetual reference to other letters previously written; and contemporaneous shipments are spoken of in the *Fanny*, and in the *Thomas Gibbons*. These vessels were captured, and brought into the *United States*

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for adjudication, and all the letters were deposited in the prize court, or delivered to the parties. How has it happened, that not a single letter, sent by any vessel after the *Francis* sailed, has been produced? How has it happened, that not a copy of any paper, relative to the shipments in the *Fanny* or the *Thomas Gibbons*, has been adduced? Is it credible, that the shipment in the *Francis* should be stated in letters written in October, 1812, and not once alluded to in prior letters? Since there must have been letters received by the claimants, which they held back from the Court, it is not an unjust conclusion, that they would not, if shewn, support the present claim.

In respect to the letters disclosed to the Court, there is much to awaken jealousy. The letter of the 22d of October is doubtless genuine. But I am entirely satisfied, that it was written after a knowledge of the capture of the *Francis*. And I cannot but remark, that notwithstanding all these ships were captured, that circumstance is not once alluded to in the correspondence, at any time. Is it possible, that the shipper should never have expressed any solicitude on the subject? Must there not be other letters between the parties? The time elapsed after the arrival of the *Francis* was ample to give the knowledge of that fact in *Glasgow* on the 22d of October, and the letter of that date has, in the concluding paragraph, an intimation, which may be interpreted to allude to the protection of the interests, which the writer had in the shipments made by him. The language of that letter is, in other respects, worthy of attention. The writer is very scrupulous in declaring his having made shipments, according to orders from the claimants, in the *Fanny* and the *Francis*, to his brother's address in *New York*. Yet, in a letter written only eight days before (on the 14th of October) there is not the

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slightest intimation of any shipment, except in the *Thomas Gibbons*. The same remark also applies to the letter of the 1st of January, 1813; and I will add, that although the originals were specially directed to be produced, a copy only of that letter is before the Court. How can these omissions be reasonably accounted for, consistent with the verity of the present claim?

The letter, however, which is annexed to the invoice of the 18th of July, is that, upon which the claimants mainly rely, to support their title; and if that letter be spurious, or not sufficiently authenticated to entitle it to credit, the Court would be insensible to its own duty, if it did not reject it, and decree condemnation.

That letter has not on it the slightest mark, to verify the time of its date, or of its receipt. It has neither post-mark, nor ship-mark, nor mode of conveyance on it. The claimants themselves do not give any satisfactory account of it. They state, that it was received either personally, or by enclosure, from Mr. *John Fleming*, but do not declare at what time, or at what place it was so received. Neither is there offered any supplementary affidavit of Mr. *John Fleming*, to confirm the declaration, nor the original letter in which it was enclosed to him. All the other original letters from Mr. *Bowman Fleming* are in his own handwriting. In this letter, the signature only is his, and the body is filled up in another handwriting. The invoice, on the same paper, is asserted to be in the handwriting of his clerk; and on examination, it bears considerable resemblance to the original invoice. There is this remarkable circumstance, that in the original invoice found on board, no charges are added, which would be natural, if the goods belonged to the shipper, but in the present invoice, charges, and insurance and commissions are found. The words "ship *Francis*, Capt. *Boyer*," on the direction of the original invoice, resemble

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the handwriting of *Mr. Bowman Fleming*, and incline me strongly to believe, that it passed through his hands. How then can we account for the omission of the charges, or of the words "the account and risk," which the new invoice of the 16th of July affects to supply?

There is another circumstance connected with this letter, which has great weight. In June, 1813, a petition was presented to the Court for a remission of the forfeiture of this shipment under the act of 2d of January, 1813. In support of the verity of that petition, and of the proprietary interest, copies of the letters of the 14th and 22d of October, and of the 1st of January, were presented. The letter, which is now under consideration, was not even alluded to, much less was it presented, as the papers in this cause most distinctly shew. This omission cannot be otherwise accounted for, than upon the supposition that no such letter was then in existence or in the possession of the claimants. It is incredible, that merchants in regular business should not be able to tell, when or where they receive important letters; and in this very case there is proof, that the claimants usually endorse letters received by themselves. If, as the claimants would lead us to suppose, this letter was written and sent about the 16th of July, it is somewhat singular that it should not have been filed with their claim, late as that was interposed, in October 1812. That it never was produced until the present term, is not accounted for in any manner; and for aught that appears on it, it may have been a fabrication of but a very few months ago.

If the Court should restore the property upon the footing of a letter so totally without authentication, it would voluntarily submit itself to every species of imposition. I have not the slightest doubt, that it was never written *bona fide* in *Scotland*. It would not, considering all the circum-

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stances, be a harsh imputation to declare, that it was probably transmitted with the invoice, and in blank, to be filled up over the signature in this country, in such manner, as the friends of Mr. *Bowman Fleming* might deem advisable.

If I had entertained any doubt, as to this transaction, I should have directed the papers and affidavits of the parties in the prize causes of the *Fanny* and the *Thomas Gibbons* to be invoked into this cause. And I should have been surprised, if some light would not have been reflected from these causes in aid of the opinion, which I entertain on this subject. But as I am entirely satisfied, that the claim is utterly without satisfactory proof, I shall condemn the property as good prize to the captors.

In case of an appeal, I shall direct all the original papers to be delivered to the captors, upon their undertaking to deliver them to the Supreme Court, and leaving attested copies in the Circuit Court. It is impossible, without an inspection, to feel the full force of some portion of the difficulties of this cause.

Condemned.

Searle, for the claimants.

Burrill and *Robbins*, for the captors.

CIRCUIT COURT OF THE UNITED STATES.

MASSACHUSETTS, OCTOBER TERM, 1815, AT BOSTON.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court,
 { Hon. JOHN DAVIS, District Judge.

DE LOYD vs. BOLT & OTHERS.

The admiralty has jurisdiction over all maritime contracts, wheresoever the same may be made or executed, and whatever may be the form of the stipulations. The admiralty has also jurisdiction over all torts and injuries committed upon the high seas, and in ports or harbours within the ebb and flow of the tide. The like causes are within the jurisdiction of the District Courts of the *United States* by virtue of the delegation of authority "in all civil causes of admiralty and maritime jurisdiction."

A policy of insurance is a maritime contract, and therefore of admiralty jurisdiction.

Courts of common law have a jurisdiction concurrent with the admiralty over maritime contracts.

STORY, J. This is a libel brought in the District Court upon a policy of insurance, alleging it to be a maritime contract, of which that court, as a court of admiralty and maritime jurisdiction, has cognizance. There is a plea to the jurisdiction, and the present question rests solely on the general sufficiency of that plea as a declinatory bar. It has been argued, and now stands for judgment.

I shall make no apology for the length of this opinion. The vast importance and novelty of the questions, which

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are involved in this suit, render it impossible to come to a correct decision without a thorough examination of the whole jurisdiction of the admiralty. I shall therefore consider, in the first place, what is the true nature and extent of the ancient jurisdiction of the admiralty; in the next place, how far it has been abridged or altered by statutes, or by common law decisions; and in the last place, what causes are included in the delegation by the constitution to the judicial power of the *United States* of "all cases of admiralty and maritime jurisdiction."

The admiralty is a court of very high antiquity. It has been distinctly traced as early as the reign of *Edward the first*.¹ If it be not of immemorial antiquity, as Lord *Coke* supposes,² it is almost certain, that its origin may be safely assigned in some antierior age.³ There is strong probability of its existence in the reign of *Richard the first*, since the *Laws of Oleron*, which were compiled and promulgated by him on his return from the Holy Land, have always been deemed the laws of the admiralty, and could not have been fully enforced in any other court.⁴ And the learned *Selden* has shewn considerable evidence of its juridical authority in the reign of *Henry the first*.⁵

¹ *Fitz. Avenry*, 192.—*S. C. Selden on Fortescue*, 67, note (e) to ch. 32.—*Zouch, on Adm. Jurisd.* 114.—*Spelman's Gloss. voce Admiral.*—*Godolphin, Adm. Jurisd.* 22 to 30.—*Eston, Adm. Jurisd.* 3.—*Seld. De Dom. maris. lib. 2, cap. 16, p. 161.*—*Id. cap. 24.*—12 Co. 79.

² *Co. Litt.* 11, b. 260. b.—*Greenway vs. Barker. Godb. R.* 260.—2 *Brownl.* 16.

³ *Godolph.* 29.—*Burroughs, Sover. of British Seas*, 7, 8, 9.—*Seld. De Dom. maris. lib. 2, cap. 14, 15, 16, 24.*—2 *Brown, Adm.* 24.—1 *Valin, Comm.* 1.

⁴ *Seld. De Dom. Maris. lib. 2, cap. 24, p. 206.*—*Seld. ad Fletam, cap. 8, s. 5.*—*Godolph.* 143 to 146.—*Roughton's articlas, art. 19, and note C. 16, and C. 17. in Clerk's Praxis* 121.—*Co. Litt.* 11, b. 260 b.—3 *Reece's Hist.* 198.—*Eston, 24, &c. 38.*

⁵ *Seld. De Dom. Maris. lib. 2, cap. 24, p. 209.*

What was originally the nature and extent of the jurisdiction of the admiralty cannot now with absolute certainty be known. It is involved in the same obscurity, which rests on the original jurisdiction of the courts of common law. It seems, however, that, at a very early period, the admiralty had cognizance of all questions of prize; of torts and offences, as well in ports within the ebb and flow of the tide, as upon the high seas; of maritime contracts and navigation; and also the peculiar custody of the rights, prerogatives, and authorities of the crown, in the British seas. The forms of its proceedings were borrowed from the civil law⁶; and the rules by which it was governed, were, as in every where avowed, the ancient laws, customs and usages of the seas.⁷ In fact, there can scarcely be the slightest doubt, that the admiralty of *England*, and the maritime courts of all the other powers of *Europe*, were formed upon one and the same common model; and that their jurisdiction included the same subjects, as the consular courts of the Mediterranean.⁸ These courts are described in the *Consolato del Mare*, as having jurisdiction of "all controversies respecting freight; of damages to goods shipped; of the wages of mariners; of the partition of ships by public sale; of jettison; of commissions or bailments to masters and mariners; of debts contracted by the master for the use and necessities of his ship; of agreements made by the master with merchants, or by merchants with the master; of goods found on the high seas or on the shore; of the armament or equipment of ships, galleys or other vessels; and generally of all other contracts declared in the customs of the sea."⁹

⁶ Zouch, 88.—Seld. ad Fleetam, cap. 8, s. 4.—Co. Litt. 11, b.

⁷ 3 Reeves' Hist. 198.—Exton, 33.—Seld. ad Fleetam, cap. 8, s. 5.—6. Vin. abrid. 506, pl. 8.

⁸ Exton, 44, 46, 49, 53.—1 Valin, Comm. 1, 120.—Roccus, Asscur. Note 80.—Cleirac. Juris. de la Marine, 191.—Zouch. 87.

⁹ Compare Consolato del Mare, edit. Casaregis, ch. 22.—Cleirac, Us et

In support of these observations, it may not be unfit to trace the early history of the jurisdiction of the admiralty in some of the more ancient records, which have escaped the ravages of time.

The Black Book of the admiralty asserts, that in the reign of *Henry* the first, and in the time of many kings before,¹⁰ when any man was indicted of felony, the admiral or his lieutenant delivered a *capias* to the admiral (the marshal) of the court, or the sheriff, to arrest him; and a very particular account is given of the manner of proceeding in case of his avoidance.¹¹ Hence its existence and criminal jurisdiction may be inferred at that early period.

The celebrated code of maritime laws, commonly called the laws of *Oleron*, were compiled by *Richard* the first, as has been already observed, on his return from the Holy Land. Besides these, he promulgated several maritime ordinances at *Grimsby* for the government of the admiralty.¹²

In the reign of King *John*, several ordinances were made with reference to the admiralty; particularly the ordinance directing the admiralty to make inquisition of all persons unlawfully taking customs, or the fees called anchorage;¹³ and the famous ordinance for striking sail (or veiling the bonnet) in token of the superiority of the British sovereign over the adjacent seas.¹⁴

Cout. Jurisd. de la marine, art. 1, note (3). 192.—*Consulat de la mer* par Boucher, ch. 22.—Zouch 90.—2 Bro. *Adm.* 30.

¹⁰ "En temps du premier roy Henry, et en temps de plusieurs rois devant."

¹¹ See *Clerke's Prax.*—*Rough. Art.* 122, note C, 16, 17.—*Exton* 32.—*Seld. De Dom. maris. lib.* 2, cap. 24, p. 209.

¹² *Prynne on the 4th Inst.* 108.—*Exton* 26, 27, 182.—*Clerk. Prax.* 113, (C. 18.)

¹³ *Exton*, 28, 29.—*Rough. Art.* 35, 36. Note C, 26.—*Clerk. Prax.* 139, 140.

¹⁴ *Clerk. Prax.* 166.—*Burrough, Sovereignty, &c.*—*Seld. de Dom. lib.* 2, cap. 28, p. 215.

In the reign of *Henry* the third, the laws of *Oleron* were ratified and republished. "

In the reign of *Edward* the first, there was a memorable ordinance prohibiting the courts having franchises, &c. from taking cognizance of any plea, exceeding 40 shillings sterling, touching merchants or mariners, as well by deed, as by charter of ships, obligations and other transactions; and farther declaring, that every contract between merchant and merchant, or merchant and mariner *beyond sea, or within the flood mark*, shall be tried before the admiral, and not elsewhere."

The immemorial jurisdiction of the admiralty is still more emphatically asserted, as to all causes arising upon the British seas, in the record in the Tower entitled "*de superioritate maris Angliæ et jure officii admiralitatis in eadem*," in the 26th year of the same reign."

¹⁸ 1 *Bib. Legum* cites *Prynne on Ath Inst.* 103.—2^o *Bro. Ad.* 39, 40.

¹⁹ "Ordonne estoit a *Hastynge* par le Roy *Edw.* le premier et ses seigneurs, que comment divers seigneurs avoient diverses franchises de trier plees ou ports, que leurs seneschaulx ni baillifs ne tendroient nul plee, s'il touche marchant ou mariner, tant par fait comme par chartre de Nefs, obligations, et autres faits, comment la somme amonte que a 20s. ou a 40s. et s'aucun est endite, qu'il a fait le contraire, et de ce soit convicte, il aura mesme le jugement comme dessus est dit." (C. 20.)

"Chacun contract fait entre marchant et marchant, ou marchant ou mariner outre la mer, ou dedans le *flood mark*, sera trie devant l'Admiral, et nenient ailleurs, par ordinance du Roy *Edw.* et ses seigneurs." (C. 21.) *Clerk. Prax.* 144.

And in *Roughton's Articles* the same is thus given. (38) "Item, inquiratur de hiis seneschallis et ballivis quorumcunque Dominorum per costeras maris dominia habentium, qui tenent, vel tenere usurpant, aliquod placitum mercatores vel marinarios concernens, excedens summam 40s. &c. Et haec est ordinatio *Edwardi* primi apud *Hastings*, regni sui anno secundo. Et Nota, quod quilibet contractus initus et factus inter calcatorem, et mercatorem, marinarium aut alios, ultra mare, sive intra fluxum maris, vel refluxum, vulgariter dictum *flood mark*, erit tristatus et determinatus coram admirallo, et non alibi, per ordinationem praedictam."—*Clerk. Praxis*, 143, 144.

¹⁷ *Burrough's Sovereign.* 8.—*Godolph.* 28.—4 *Inst.* 142.—*Prynne on Ath Inst.* 109.—*Selden de Dom. lib. 2, cap.* 19, 24, 28.—*Exton*, 58.

After reciting the immemorial right of the King of England to

But it is principally in the records of the reign of *Edward* the third, that our attention should be closely drawn to the nature and extent of the jurisdiction of the admiralty; for to this period has the statute of 13 Rich. 2. explicitly referred.

Edward the third gave to the laws of *Oleron* their final confirmation; ¹² and called a solemn convocation of all the judges of the realm, among other things, to retain and preserve the ancient superiority of the British seas, and the official rights of the admiralty. ¹³

But the most venerable monument is the Black Book of the admiralty itself, which, though it contains considerable additions of later periods, is generally agreed to have been

the sovereignty of the British seas, and the right to make laws to regulate navigation, and to keep the peace, in those seas, it proceeds "Et A de B., admiral de la dit mer, deutey par le roy d'*Engleterre* et tous les aultres admirals par mesme celui roy d'*Engleterre* et ses ancestors, jades roys d'*Engleterre*, eussent est en paisable possession de la dit sovereign garde, ove la conissance et justice et tous les aultres appartenances avantdits, &c. especialment par empeschement metre et justice faire, surete prendre de la pees de tout manere de gentz usants armes en la dit mer ou menans niefs autrement appareilles ou garnies, que n'appartient au nief de marchants, et en aultres points, en queux homme poit avoir reasonable cause de suspicion vers eux de robbery ou des aultres mesfaits."

¹² 2 *Brown Adm.* 40.

¹³ The article stands thus—"Item, ad finem quod resumatur et continuetur, ad subditorum prosecutionem, forma precedendi quondam ordinata et inchoata per avum domini nostri regis (*Edwardum* 1.) et ejus consilium, ad retinendum et conservandum antiquam superioritatem maris Angliæ et jus officii admirallatus in eodem, quondam corrigendum, interpretandum, declarandum, et conservandum, leges et statuta per ejus antecessores, Angliæ reges, dudum ordinata ad conservandum pacem et justiciam inter omnes gentes nationis cujuscunque per mare Angliæ transcentes, et ad cognoscendum super omnibus in contrarium attemptatis in eadem, et ad puniendum delinquentes, et damna passis satisfaciendum; quæ quidem leges et statuta per Dominum Richardum, quondam regem Angliæ, in reditu suo a terra sancta correctæ fuerunt, interpretata, declarata et in insula *Oleron* publicata, et nominata in lingua Gallicana "*Le Ley Oleroun*."—*Burrough's Sovereignty*, 10.—*Selden de Dom. Lib.* 2, cap. 32, cap. 24.—*Godolph.* 143.—4 *Inst.* 144.—*Exton*, 25, 61.

originally compiled in this reign.²⁰ This book has always been deemed of the highest authority in matters concerning the admiralty. Besides the laws of *Oleron* at large, it contains an ample view of the crimes and offences cognizable in the admiralty, and also occasional ordinances and commentaries upon matters of prize and maritime torts, injuries and contracts.²¹ Among other things, it prohibits the suing of merchants, mariners and other persons at the common law for any thing appertaining to the marine law of ancient right.²² In respect to torts and injuries, the jurisdiction is most explicitly asserted, as well in ports within the ebb and flow of the tide, as upon the high seas, as will appear from the slightest inspection of the articles of the admiralty, and particularly the Inquisition at *Queensborough* in this very reign—(49 Edw. 3.)²³ And the binding authority of the laws of *Oleron* and the customs of the sea in the court of admiralty is several times alluded to and enforced in the same inquisition.²⁴ Indeed, of such high repute were these laws, that by an ancient edict of *France*, it was de-

²⁰ *Exton*, ch. 13 and 14, p. 185, 191.—*Frynas on 4th Inst.*, 106, 115.—*Preface to Roughton's Articles, Clerk's Praxis*, 92.

²¹ See *Roughton's Articles in Clerk's Praxis*, 99, &c. 168, &c.

²² (d) "Soit enquis de tous ceulx qui empleient aucuns merchant, mariner, ou autre homme quelconque a la commune ley de la terre appartenant a ley marine d'ancien droit.—Soit enquis de tous juges, qui tiennent devant ceulx aucuns ples appartenants par droiture a la Court de l'Admiraltie."—Or as *Roughton* renders it, "Inquiratur de his, qui implacitant aliquos, alibi quam in curia admiralitatis, de his negotiis seu causis, quæ ad forum admiralitatis pertinere noscuntur."—*Rough. Art.* 18, and note C. 35. D. 51. D. 52.—*Clerk's Praxis*, 120. *Rough. Art.* 38.—*Clerk's Praxis*, 143.

²³ See *Rough. Art.* 7, D. 26.—*Id.* 8, D. 27.—*Id.* 12, D. 87.—*Id.* 21, D. 65.—*Id.* 22, D. 66.—*Id.* 25, D. 45.—*Id.* 26, D. 47.—*Id.* 29, D. 50.—*Clerk's Praxis*, 110, 111, 116, 125, 126, 129, 130, 134.—*Exton*, 172.

²⁴ "Soit enquis de tous mariners, qui mettent en violence main, ou battent leur maistres encontre les loys de la mer et statuts d'*Oleron* sur ce faits."—*Rough. Art.* 25. Note D. 45.—*Cl. Praxis*, 129.—*Rough. Art.* 26, D. 16.—*Cl. Praxis*, 131.

clared, that the admiralty ought to do justice according to the rights, judgments and usages of *Oleron*.²⁵

As to maritime contracts, the jurisdiction of the admiralty is expressly affirmed in the same book over all such contracts made abroad and within the flood mark.²⁶ And as to all causes, it is commanded that the admiralty shall do right and justice summarily and by plain process, according to the marine law and the ancient customs of the sea.²⁷ And here it may be proper to guard against the mistake, that the particulars enumerated in these various regulations and ordinances comprehend and limit the whole extent of the jurisdiction of the admiralty. They cannot legally be considered in any other light, than as occasional directions to a court already existing with general powers, to clear away a doubt, or to enforce more exactly an observance of an existing right or duty.

The commissions too of the judges of the admiralty in this and the preceding reigns evince a very extensive cognizance over maritime transactions, as well in ports as on the high seas. The admiral is frequently styled therein, in reference to his judicial authority, "*custos maritimarum partium*," "*custos portuum cum costra maris*," "*custos marinæ*," "*custos portuum et marinæ*," "*capitaneum et admirallum flotæ marinæ nostræ omnium marium, et tamquamque portuum, &c. quam aliorum portuum et locorum per coasteram maris*,"²⁸ and finally (as in the commission of *Robert de Herle* in 35 *Edward* 3,) as having "*plenam*,

²⁵ *Zouch*. 88.

²⁶ *Rought. Art.* 38 and *C.* 21.—*Clerk. Prax.* 143, 144.

²⁷ "En primes pour faire droit et due justice a toutes parties, si bien poursuyants comme defendants, en la Cour de l'Admiraltie. est de faire sommaire et plain process selon loy marine et anciennes coustumes de la mer.—*Cl. Praxis*, 160, D. 71.

²⁸ *Exton*, 15, 70, 76.—*Seld. de Dom.* lib. 2, cap. 14.

tenore patentium, potestatem audiendi querelas omnium et singulorum de hiis quæ officium admiralli tangunt et *cognoscendi in causis maritimis*, &c." ²⁰

Such are some of the relics of antiquity, which are to be found in the learned treatises on the admiralty jurisdiction. From a historical review of them ; from the consideration that in all other states in *Europe*, maritime courts were about the same period established, possessing the same jurisdiction, *viz.* over all maritime torts, offences, and contracts, proceeding by the same forms, *viz.* the forms of the civil law, and regulated by the same principles, *viz.* the ancient customs of the sea ; from the consideration, that commercial convenience, and even necessity, at the same period, required a court of as extensive jurisdiction in *England*, and the acknowledged fact, that from its earliest traces the admiralty of *England* is found exercising a very extensive maritime authority, governed by the rules and forms of proceeding of the civil law, and, where statutes were silent, by the usages of the sea ; from all these considerations it has been inferred, and, in my judgment, with irresistible force, that its jurisdiction was coeval and coextensive with that of the other foreign maritime courts.

At all events, it cannot be denied upon these authorities, that before and in the reign of *Edward* the third, the admiralty exercised jurisdiction, 1. Over matters of prize and its incidents. 2. Over torts, injuries, and offences, in ports within the ebb and flow of the tide, on the British seas and on the high seas. 3. Over contracts and other matters regulated and provided for by the laws of *Oleron* and other

²⁰ The words of this commission are—"Dantes ei plenam, tenore patentium, potestatem audiendi querelas omnium et singulorum de hiis, quæ officium admiralli tangunt, et *cognoscendi in causis maritimis*, et justitiam faciendi, et excessus corrigendi, et delinquentes juxta eorum demerita castigandi, puniendi, incarcerandi, et incarceratos, qui deliberandi fuerint, deliberandi, et *omnia alia, quæ ad officium admiralli pertinent, faciendi*, &c. &c. *Exton*, 3, 294.

special ordinances, and 4. (as the commission of *Robert de Herle* shews) Over maritime causes in general. And even Lord *Coke* admits, that maritime causes include causes arising upon the sea shore and in ports; for he declares "*maritima est super littus or in portu maris.*"²⁰

That this jurisdiction was, from its original establishment, *exclusive* of the courts of common law in all cases, may perhaps admit of doubt; for it appears from some early cases, on which we shall have hereafter occasion to comment, that the courts of common law did, in some few instances, assume authority to adjudicate upon cases arising upon the seas. But that there is any authority previous to the 13 *Richard 2*, which, properly considered, impeaches the jurisdiction of the admiralty, as here asserted, may be with some confidence denied.

Let us now proceed to consider such cases, as have been supposed to impugn or weaken the conclusions, which have been attempted to be drawn thus far in favour of the admiralty. And here we must rest altogether upon the citations of Lord *Coke* in his view of the admiralty jurisdiction in his fourth Institute.²¹ It is well known with what zeal, ability, and diligence, he endeavoured to break down the court of chancery, as well as the admiralty. It would have been fortunate for the maritime world, if his labours in the latter case had been as unsuccessful, as in the former. There are many persons, who are dismayed at the danger and difficulty of encountering any opinion supported by the authority of Lord *Coke*. To quiet the apprehensions of such persons, it may not be unfit to declare, in the language of Mr. Justice *Buller*, that "with respect to what is said relative to the admiralty jurisdiction in 4 *Inst.* 135, that part of Lord *Coke's* work has been always received with great

²⁰ *Hamberidge's Case*, 12 Co. 129.

²¹ 4 *Inst.* 134.

caution, and frequently contradicted. He seems to have entertained not only a jealousy of, but an enmity against, that jurisdiction."³²

The first citation of Lord *Coke* is of two writs in the Register,³³ one for taking and carrying away a ship found at H. and the chattels on board of the same ship;³⁴ the other for drawing wine out of a tun put on board a ship at S. to be brought from thence to S. and filling up the tun with salt water.³⁵ It is difficult to perceive in what manner these writs can touch the admiralty jurisdiction, for the torts are not even in the writs supposed to be upon the high seas, or within the ebb and flow of the tide.

The next citation is a writ in the Register,³⁶ which is thus described by *Fitzherbert*. "If an English merchant be robbed and his goods be taken from him, *beyond seas*, by merchant strangers, and the English merchant sue beyond sea to have justice and restitution made thereof, and cannot obtain it, and this matter be testified unto the king in his chancery by divers credible persons; now, upon this testimony, if the merchant strangers come into any place within the realm of *England* with their goods, then the English merchant shall have a writ out of chancery directed unto the mayor or bailiffs, where such merchant strangers are with their goods, to arrest them and their goods, and to keep them

³² *Smart vs. Wolff*, 3 T. R. 348. ³³ F. N. B. 87, 88.

³⁴ S. W. 50 H. 3, cited in *Selden on Fortescue de Laud*, ch. 32, note (e).—*Register Brev.* 95.—"Quare vi et armis quandam navem ipsius A. precii decem librarum apud H. inventam cepit et abduxit, et bona et catalla sua ad valentiam viginti librarum in eadem navi inventa cepit, et asportavit."

³⁵ *Register Brev.* 95 b. "Quare vi et armis 60 lagenas de quodam dolio vini ipsius W. precii quinque marcarum in navi predicti I. apud S. posito, abinde usque S. ducendo, extraxit, et dolium illud aqua maritima implevit, per quod &c."

³⁶ F. N. B. 114.

under arrest until they have satisfied the party his damages, which he hath sustained by reason of their misdoing.”—“But it seemeth the English merchant shall not have such writ for any debt due to him from a merchant stranger upon a contract made beyond seas, if the merchant do come into England or his goods; *quære tamen* hereof.”—In the Register itself ³⁷ the tort is thus alleged “quodcum ipse nuper apud C. in partibus de Spinia in villa de C. causa mercandisandi moram traxisset, et bona et catalla ad valentiam centum librarum emisset, J. et T. et alii malefactores dictæ villæ mercatores de dictis partibus de S. prefatum S. apud dictam villam de S. vi et armis ceperunt et imprisonaverunt, et bona et catalla sua predicta ab eo abstulerunt, et alia, &c. ei intulerunt, contra legem et rationem in ipsius S. damnum non modicum, et depauperationem manifestam.” It is manifest that this writ merely respects a trespass to the person and goods of an English merchant committed in the territory of a foreign sovereign; a subject, over which the admiralty never claimed, or exercised any judicial authority. And perhaps it may be inferred from the language of *Fitzherbert*, that the common law courts did not originally take cognizance of contracts between merchants in foreign countries; and we shall in fact find, that the admiralty did claim to exercise jurisdiction over them at a very early period.³⁸

Another citation is from *Fitzherbert's Abridgment*.³⁹ It stands thus. “Nota per Stanton Justice, que ceo nest pas sauce de mere ou home puit veier ceo que est fait del un part del ewe et del autre, come a veier de l'un terre tanque a l'autre, que le coroner viendra en ceo cas et fera son

³⁷ P. 129.

³⁸ *Clerke's Praxis*, 143, 144. C. 21.

³⁹ *Corone* 399, in 8 *Edw. 2.*—S. C. *Staud. Pl. Cor. lib. 1*, p. 51, b.

office, auxi comme aventure a vyent en un brace del mere, la ou home puit veier de l'un parte tanque a l'autre, del aventure, que en cel lieu avient, puit pais aver conusance." The opinion here maintained is, that it is not a creek of the sea, where a person may see what is done from both shores; and that in such place the coroner may exercise his official jurisdiction, as he well may in an arm of the sea, where an accident happens, which may be seen from both shores, for in such case the *pais* may have cognizance thereof. In respect to the first part of this opinion, it cannot be supported; for a creek, or, (what is the same thing) an arm of the sea, is where, and as far as, the sea flows and reflows, without any reference to the distance of the enclosing shores. " And admitting, that the opinion of a single judge, (on what occasion we know not,) is to be considered as settling the law, the residue of the opinion proves no more, than that, in those ancient times, in such creeks of the sea the coroner had jurisdiction. Yet from this *Staundford*, and after him Lord *Coke*, infer that the admiralty had no jurisdiction in those places, but only upon the high seas.⁴¹ This inference is inadmissible, since there is very strong evidence, that, at and before the same period, the admiralty exercised authority in the creeks, arms and ports, of the sea; and so the jurisdiction could at most be only *concurrent*. Lord *Hale* explicitly asserts, that in ancient times the common law exercised jurisdiction, *concurrent with the admiralty*, over crimes committed even upon the narrow seas or coasts, though it were high sea; and that this jurisdiction did not cease until about the 38 *Edw.* 3; and, among other cases in support of his opinion, he cites this very case in 8 *Edw.* 2, and infers from it, that in the present times, as well the coroner of the county, as of the *admiral*, may take inqui-

⁴⁰ 22 *Assis.* 93.—*Hale de Portubus maris*, ch. 4.

⁴¹ *Staundf. lib.* 2, p. 51.

sitions upon deaths happening in great rivers, namely, arms of the sea, that flow and reflow, beneath the first bridges ;⁴² and that, notwithstanding the stat. of 28 H. 8, ch. 15, the courts of common law have still a *concurrent* jurisdiction of all felonies committed in a navigable arm of the sea.⁴³ Admitting then, that this case is good proof of the jurisdiction of the common law, it is not shewn to be *exclusive* of that of the admiralty, but is perfectly consistent with it.

The next case is 43 Edw. 3, (cited in *Dyer* 326) which decides no more than, that marsh land, bordering on the sea, over which the sea ebbs and flows, may be parcel of a manor; from which Lord *Coke* infers, that it must be parcel of the county. Assuming this inference to be correct, it does not follow, that the jurisdiction of the admiralty is excluded; for in *Sir Henry Constable's* case, "it was clearly held, that the soil, on which the tide ebbs and flows, may be parcel of a manor, and yet that the common law and the admiralty have there a divided empire, the former when the tide ebbs, and the latter when it flows.

The next case is 5 Edw. 3, 3.⁴⁴ It was a replevin for goods taken in the vill of W.; the defendant justified, that he took them, as wreck of the sea, by virtue of a franchise of wreck appendant to his manor; and the whole case turned upon a mere point of pleading. There is nothing in it touching the admiralty; and the only possible deduction from it is, that a plea of wreck of the sea was sustained in a court of common law; but nothing can thence be argued, that this was an exclusive jurisdiction.⁴⁵

⁴² 2 *Hale P. C.* 12, 13. note (a), 14, 15, 16.

⁴³ 2 *Hale P. C.* 18, and see *Zouch*. 114.—40 *Assis.* 25.—*Rex vs. Soleguard. Andr.* 231.

⁴⁴ 5 *Co.* 10. b. 107.

⁴⁵ *S. C. Fitzh. Abrid. Replevin* 41.

⁴⁶ *S. P.* in 37 and 38 H. 3, cited *Fortes. de Land. ch.* 32, *Selden's note* (c).

The next case, 43 *Edw. 3*, stands thus in *Fitzherbert's Abridgment*.⁴⁷ "Trespas fait en *Kingston sur Hull*, port pur A. d'un nyeff prist en le en de *Hull* versus certain persons. Le maire et bayles de *Hull* demandent conusance par chartre le roye a eux grant, quod cives nec burgesses de *Hull* non implacentur alibi de aliquibus transgressionibus, conventionibus, contractis *infra burgum*, quam *infra burgum*; et fuit challenge eo que l'un partie fuit estranger, et nient burgess, et auximent semble que il n'est enclose en ceux parolx que ils puissent tener plees. *Finchdon* dixit sic; et pur ceo le conusans fuit graunt, &c."

It would seem from the reasons assigned by *Finchdon*, that the conusance ought to have been, and in fact was, denied; and that the word "non" was omitted in the abridgment by mistake. But Lord *Coke* asserts that it was granted, and that this "proveth that the haven of *Hull*, where the ship did ride, was *infra burgum* de *Hull*, and by consequence *infra corpus comitatus*, and determinable by the common law and not in the admiral court." The case authorizes no such conclusion. It does not appear, that the place where the ship was taken, was within the ebb and flow of the tide, but only that it was "on the water of *Hull*;" much less does it appear, that any point, as to the right of the admiralty to entertain suits for acts done in ports, was even glanced at, or put into controversy. The case turned wholly on the claim of the corporation of *Hull* to withdraw suits arising within its franchises from the courts of common law. For aught that appears, *Hull* might have had the franchise to hold pleas of things done on tide waters, as it is unquestionable the corporation of *Ipswich* had.⁴⁸ And even if the claim of conusance by *Hull* were well founded, it does not follow that a concur-

⁴⁷ *Conusance* 36.⁴⁸ *Exton*, 138, 142.

rent jurisdiction might not still remain in the admiralty over all things within its general authority.⁴⁹

The next case is 48 *Edw.* 3, 3, in which it would be supposed from Lord *Coke's* manner of quoting, that it was adjudged "if a mariner make a covenant with me to serve me in a ship upon the sea, yet, if his wages be not paid, they shall be demanded in this court by the common law, and not by the law of mariners,"⁵⁰ or the marine law. In fact, on examining the year book, it is incontestible that this was the mere argument of *Tankard*, as counsel in the cause, and it was not in any manner recognized by the court. Nor did the case in judgment require any such observation. It was an action brought, among other things, for a sum due on a retainer to serve in the war in *France*; and the exception taken was, that this was triable before the court of the constable and marshal, being of a service in war out of the realm. *Finch*. however held, that the courts of common law had cognizance of the cause. It is manifest upon this statement, that nothing can be gathered from this case in favour of Lord *Coke's* favourite position. But there is a pretty strong implication in the argument, that mariners' wages were, at that time, claimed as within the cognizance of the maritime court. And Lord *Holt* himself has declared⁵¹ that the jurisdiction of the admiralty, in case of mariners' wages, was a very ancient concurrent jurisdiction, as ancient as the constitution itself.⁵² And it should never be forgotten, that this dictum of counsel, frail and untenable as it is, is the only authority previous to the 13th of *Richard 2*, which the diligence of its most strenuous foe has been able to adduce, to take from the admiralty its

⁴⁹ See *The King vs. Soleguard*. *Andrews, Rep.* 331.

⁵⁰ "Et ne pur la ley de mariner."

⁵¹ *Brown vs. Benn.* 2 *Lord Raym.* 1247.

⁵² *S. P. The Queen vs. London*, 6 *Mod.* 205.

jurisdiction over maritime contracts. All the other cases apply to the jurisdiction over torts and injuries in ports or in arms of the sea.

But the case, which is mainly relied on against this jurisdiction, is that in the time of *Edward the first*, as cited in *Fitzherbert's Abridgment*.⁵³ It stands thus. Replevin de son nyeff prise en le cost de *Scarburgh en le mere*, et dillonques fist carier en le conte de N. et la le detient, &c. *Mutford*. Il se pleint de prise en le cost de S., que n'est ville ni lieu certain par que pais puit estre prise, quare le cost dure 4 leuks, et auxi de chose fait en le mere cest court ne puit aver conusans, quare certain jugement est done as mayners. *Bery*. Le roy voit que le pease soit cy auxi bien gard en le mere, come en le terre, et nous trovomus que vous estes venu per due proces, et ne veiomus riens pur que ne deves respondre. *Mutford*. Il suppos le prise estre fait en la counte de E. et il port son breve al vicecomte de M. [N.] d'aver delivere, et issint suppos le distress prise et amesne de un counte en auter, par que il ad breve don per le Statut en ce cas. *Howard*. Le Statut parle des avers amesnes de un counte en auter, et ne des che'ux. *Mutford*. Le Statut parle generalment de distress, que comprehend de ambideux. *Howard*. Jeo ne crey que je usse eu sur le statut. *Mutford*. Donques usses eu le vi et armis, car ceo chose encountre le pese et chescun que doit distrein, doit le distres poser en ceo lieu ou la deliverance puit estre fait al comen ley. *Howard* pria conge d'enquerer meliour brief." This is the whole case, from which Lord Coke draws "the following extraordinary conclusions. 1. That it is called the sea, which is not within any county from whence a jury may come. 2. That the sea, (being not within any county) is not within the jurisdiction of the court of common pleas, but belongs to the

⁵³ *Avowry*, 192.⁵⁴ 4 *Inst.* 140, and 12 *Co.* 79.

admiral jurisdiction. 3. That when the ship came within the river, then it is confessed to be within the county of *Northumberland*. 4. That when a taking is partly on the sea, and partly in a river, the common law shall have jurisdiction. 5. And (12 Co. 79) that if a thing be done upon the sea *hors del county*, the party may plead to the jurisdiction of the court.

As to these conclusions, many remarks might be made. It is true, that *Muttford*, of counsel for the defendant, did assert that the courts of common law had no jurisdiction of things done upon the sea, for that a certain judgment, (which Lord Coke interprets as meaning the jurisdiction of the admiralty ^{as} is given among or to mariners. But *Berryford*, C. J. utterly denied it, and so far from allowing the claim of the admiralty to jurisdiction *on the sea*, or even admitting its legal existence, he expressly declared, that the King willed, that the peace should be kept, as well on the sea as on the land, and that, as the party was by due process before the court, he should be compelled to answer. Of what was he to answer? Of an alleged trespass *upon the sea* on the coast of *Scarburgh*. So that there is not any pretence that the injury arose in any port, or within any county of the realm. Nor is there any intimation by the court, that the taking, for which the suit was brought, was within any county, from which a jury might come; nor that the jurisdiction was sustained because, after the taking upon the sea, the ship was brought into port; nor that the sea was without the body of any county. On the contrary, the court expressly claim jurisdiction to keep the peace *upon the sea*, as well as upon the land, and overrule the objection of the counsel, as to the necessity of the act's being done in some place upon land, from whence a jury might come.

So far then from its being true, as Lord *Coke* boldly asserts, " that "all these points are directly, without any strain, collected out of the said book," it may be safely affirmed, that not one of them derives any support or countenance from the report; but, as far as the case decides any thing, it is against them. And finally the case went off against the plaintiff upon his own prayer for a better writ.

Nor is this all. The same case is more fully and exactly reported by *Selden* from a manuscript year book in his own possession, from which it is here recited *verbatim*.⁵⁷ "*William Crake de Hotham* fuit sommon a respondre a *Robert de Beufs*, de play pour que il avoit prise une sune nief, pris de l.40, en le mer juste la costere de *Scardburg*, et de yleke le amena a *Hotham* en le counte de *Norff*.—*Muttford*. Del hore qu'il avute counte de une prise fete en le mer que est hors del conte, issi que si pais se join fiats, il ne sавereint a quel visconte mander pur fere vener pays, e demand jugement, si ceyns pussont de ces conuster.—*Ed' autre part*, il ly sont assigne Admirall de par le roy sur la mer, a oyer et terminer les pleynts de chose fait en mer, et n'entendons point, que vous volys a eux tolyr jurisdiction. *Bery*. Nous avons poer general pur my tut *Engleterre*, mes del poer des Admiralls, dont vous parles, ne savons rien, ne rien de nostre poer a eux volumus assigner, si ceo ne seist per commandement le Roy, de quey vous ne monstres rien, &c. *Muttf*. Sire, le luy, ou ils dient la neef este pris, n'est in nulle visne de que, &c. *Howard*. Il est issint visne, que si une homme occist un auter la il serra pris et amesn al terre e pende, aussi ben come pur fet fet sur le terre. *Metingham*. Nous vous dions que nous avons ausi ben poer de conisans de fet

⁵⁶ 12 Co. 59.⁵⁷ *Selden on Fortescue*, ch. 32, note (c).

fet en mer come sur terre, dont agard que vous respondes ouster."

This is undoubtedly an authentic report, and completely confirms the observations already made upon Lord *Coke's* extraordinary commentary. It is here explicitly stated by counsel, that the admiralty had jurisdiction to hear and determine all complaints of things done upon the seas; and that the supposed taking was upon the sea without any county. But *Beryford*. C. J. in answer said, "we have general jurisdiction throughout all *England*; as to the power of the admirals, of whom you speak, we know nothing, and we will assign to them none of our power, unless by command of the King, of which you shew nothing."—And upon the argument's being again pressed, that the taking was not in any ville or neighbourhood, from which a jury might come, *Metingham* J. declared, "we again say, that we have power to take cognizance of a thing done as well upon the sea, as upon the land; and we award you to answer over." It is clear, therefore, that the court did claim a common law jurisdiction over the sea at this time. And the learned *Selden* (who is not an advocate for the admiralty in general) accordingly remarks "it seems to me by this, that in those times the common law had cognizance of things done upon the British sea, however afterwards it kept its limits *infra corpus comitatus*, leaving the sea to the admiralty;" and in his treatise upon the dominion of the sea, he deliberately asserts the same doctrine.⁵⁷ In corroboration of this doctrine, there is in *Molloy* (Book 2, ch. 3, s. 16, p. 224,) a copy of a record in the Tower of 24 *Edw.* 3, in which an action was brought at common law for an embezzlement on board of a ship on the high seas ("in mari juxta Britanniam") and the plaintiff recovered judgment.⁵⁸

⁵⁷ *Selden de Dom. mar. lib. 2, cap. 14, p. 155, cap. 24, p. 209.*

⁵⁸ See also *Spelman Reliq.* 217.—40 *Assis.* 25.—*Zouch* 114.—2 *Hale*

Another case is 7 *Rich. 2*, cited from *Statham's Abridgment*.³⁹ It is thus summarily stated "En trans d'un neife et certain marchandises pris; *Vavasour*, Nous le prisonnus en le haut mere ovesque les Normandes qu'eux sont ennemyes le Roy, jugement si actionem. *Markham*, Ceo amount a nient pluis que de riens coupable. *Charleton*, ceo ple est bone, per quod respondes a ceo."

If this case prove any thing, it proves, that a capture on the high seas from the enemy may well be pleaded as a special plea and bar to an action of trespass for the capture; and that a court of common law will sustain such a plea. If it be supposed to affirm the jurisdiction of such a court over matters of prize, it is not law; if to deny it, it has nothing to do with the present controversy.

These are all the cases adduced by Lord *Coke* down to the 13 *Rich. 2*, to disprove the jurisdiction, which has been asserted in favour of the admiralty. Unless I am very much mistaken, they entirely fail of their intended purpose; and leave the current of ancient authority flowing with an uniform and irresistible force in its favour.

Such then being the ancient or original jurisdiction of the admiralty, it will be in the next place proper to consider, in what respects it has been altered by statutes and decisions made since the period, of which we have been speaking.

The stat. 13 *Rich. 2*, ch. 5, enacts, "that the admirals and their deputies shall not meddle henceforth of any thing done within the realm, but only of a thing done upon the sea, according as it hath been duly used in the time of the noble King *Edward* [3] grandfather of our Lord the King, that now is."⁴⁰

P. C. 17.—*Sea Laws, Treatise of the Dom. of the Sea*, 145.—And *Exton* 121, &c. where he comments very satisfactorily on this very case.

³⁹ *Transgressio* pl. 54.

⁴⁰ "Que les admirals et leur deutees ne sol mellent desorenavant de nulle chose fait deinz le Roialme, mais seulement de chose fait sur le mer selonc ceo q'ad este duement use el temps du noble Roy *Edward* aiel nostre seigneur le roy q'or est."

De Lovio vs. Boit.

The stat. 15 *Rich.* 2, ch. 3, enacts "that of all manner of contracts, pleas and quereles^a [complaints or controversies] and of all other things done or arising^a within the bodies of counties, as well by land as by water; and also of wreck of the sea, the admiral's court shall have no manner of cognizance, power nor jurisdiction; but all such manner of contracts, pleas and quereles, and all other things rising within the bodies of counties, as well by land as by water, as afore, and also wreck of the sea, shall be tried, determined, discussed and remedied, by the laws of the land, and not before or by the admiral, nor his lieutenant, in any wise. Nevertheless of the death of a man, and of a maihem done in great ships, being hovering in the main stream of great rivers, only, beneath the bridges^a of the same rivers nigh to the sea, and in none other places of the same rivers, the admiral shall have cognizance; and also to arrest ships in the great flotes for the great voyages of the king and of the realm; saving always to the king all manner of forfeitures and profits thereof coming; and he shall also have jurisdiction upon the said flotes during the said voyages, only saving always to the lords, cities and boroughs, their liberties and franchises."

The stat. 2 *Hen.* 4, ch. 11, provides, that the statute, 13 *Rich.* 2, be firmly holden and kept, and put in due execution; and that, as touching a pain to be set upon the admiral or his lieutenant, that the statute and the common law be holden against them; and that he, that feeleth himself grieved against the form of the said statute, shall have his action grounded upon the case against him that doth so pursue in the admiral's court, and recover his double damages against the pursuant, and the same pursuant shall incur the pain of l.10 to the King for the pursuit so made, if he be attainted.

^a "Contractes, plees et quereles."

^a "Faltz ou soundantz." *Exton omits* "ou."

^a "Pounts."

It was upon these statutes, that the controversies respecting the admiralty were so zealously and obstinately maintained during more than two centuries. It is not my intention to examine how far the statutes themselves or the preambles thereof, or the petitions, on which they were founded, have been fairly published from the records of the Tower.⁴⁴ It will be sufficient for my purpose to shew, what have been the constructions respectively urged by the advocates and the opponents of the admiralty, and to consider how far the respective opinions are reconcilable with themselves or with sound principles.

In the construction of these statutes, the admiralty has uniformly and without hesitation maintained, that they never were intended to abridge or restrain the rightful jurisdiction of that court; that they meant to take away any pretence of entertaining suits upon contracts arising wholly upon land, and referring solely to terrene affairs; and upon torts or injuries which, though arising in ports, were not done within the ebb and flow of the tide; and that the language of those statutes, as well as the manifest object thereof as stated in the preambles, and in the petitions, on which they were founded, is fully satisfied by this exposition. So that consistently with these statutes, the admiralty may still exercise jurisdiction 1. Over torts and injuries upon the high seas and in ports within the ebb and flow of the tide, and in great streams below the first bridges; 2. Over all maritime contracts arising at home or abroad; 3. Over matters of prize and its incidents.

On the other hand, the courts of common law have held, that the jurisdiction of the admiralty is confined to contracts and things *exclusively* made and done upon the high

⁴⁴ Those who have curiosity to indulge in such speculations may receive a great deal of information from the learned labours of Doctor Eston. See *Eston ch. 2, p. 288, Id. ch. 5, p. 314, Id. ch. 6, p. 331.*

seas, and to be executed upon the *high seas*; that it has no jurisdiction over torts, offences or injuries, done in ports within the bodies of counties, notwithstanding the places be within the ebb and flow of the tide; nor over maritime contracts made within the bodies of counties or beyond sea, although they are, in some measure, to be executed upon the high seas; nor of contracts made upon the high seas to be executed upon land, or touching things not in their own nature maritime, such as a contract for payment of money; nor of any contracts, though maritime and made at sea, which are under seal or contain unusual stipulations; and to complete the catalogue of disabilities, it has been strenuously held by Lord *Coke*, that the admiralty is not a court of record, and of course has no power to impose a fine, and that it cannot take a recognizance or stipulation in aid of its general jurisdiction.⁶⁶ So that, upon the common law construction of these statutes, the admiralty, as to contracts, is left with the idle and vain authority to enforce contracts, which are made upon the high seas to be executed upon the high seas. We shall have occasion hereafter to notice some extraordinary exceptions to these doctrines.

Happily for the admiralty, it has been able to regain the right to fine and punish for contempts,⁶⁷ and to take and enforce stipulations.⁶⁸ But let it not be imagined, that the limited powers at present permitted to be exercised by the admiralty have been obtained without a struggle. From a historical review of the cases in the books, it will abundantly appear, that it has been constantly in danger of losing its most useful jurisdiction. On the other hand, the courts of

⁶⁶ *Tomlinson's Case* 12 Co. 104.—4 Inst. 134.—*Empringham's Case* 12 Co. 84, and cases cited in *Creamer vs. Tookley*. Godb. 385, 387.

⁶⁷ 12 Co. 52.—1 Vent. 1.—*Styles* 17.

⁶⁸ *Hook vs. Shoreton* 1. Ld. Ray. 397.—S. P. 2 Ld. Ray. 632.—*Greenway vs. Barker*, Godb. 261.

common law, by a silent and steady march, have gradually extended the limits of their own authority, until they have usurped or acquired concurrent jurisdiction over all causes, except of prize, within the cognizance of the admiralty.— And even as to matters of prize, its exclusive authority was not finally admitted and confirmed until the great case of *Lindo vs. Rodney*,⁷⁰ almost within our own times. It is curious indeed to observe the progress of the pretensions of the courts of common law in amplifying their jurisdiction. At first they disclaimed all cognizance of things done without the bodies of the counties of the realm; and even over collateral matters done out of the realm, which came incidentally in question upon issues regularly before the courts.⁷¹ They afterwards held cognizance of contracts originating within the realm, to be executed abroad; of contracts made abroad, to be executed within the realm; and finally, after much hesitation and doubt, by the use of a fiction, often absurd and never traversable, over all personal causes arising on the high seas or in foreign realms, without any regard to the place of their transaction or consummation.⁷² Upon what principles of the ancient common law this extension of jurisdiction can be supported, it is difficult to perceive. It has, however, been established by the usage and decisions of ages; and now rests upon the same basis and no other, that sustains the immemorial claims of the admiralty.

⁷⁰ *Lindo vs. Rodney*. Doug. R. 613. n.

⁷¹ *Mayn. Year Book*, 613. 18 Edw. 2.—*Litt. lib.* 3, s. 440. 21 Edw. 4 36.—*Doctor and Stud. B.* 2, ch. 2.—*Fortescue*, ch. 32 p. 38.—*Seld. de Dom. Maris*, ch. 24, p. 209, and the cases cited in *Creamer vs. Tookley*, Godb. 385. 387.

⁷² See 1 *Rich.* 3, 4, pl. 7.—32 H. 6, 25, b.—39 H. 6, 39.—11 H. 7, 6.—F. N. B. 114.—*Dowdale's Case*, 6 Co. 46.—*Co. Litt.* 261, b.—4 *Inst.* 141, 142.—*Constable's Case*, 5 Co. 106.—12 Co. 79.—2 *Inst.* 51.—2 *Brownl.* 16. *Tucker vs. Capp*, 2 Roll. R. 497.—*Spanish Ambass. vs. Jolliff*. Hob. 78.—*Zouch*. 101, 125.

It will be necessary, in the subsequent examination of the doctrines which the common lawyers have asserted to support their construction of the statutes of *Richard 2*, to class the cases, in order more effectually to investigate the principles upon which they are founded. Before, however, we proceed to that examination, it may be well to dispose of some of the cases cited by Lord *Coke*,⁷³ which cannot properly be reviewed in any other manner.

Several of these may be dismissed in a few words. The cases in 12 H. 6, *rot.* 123, 124, in 38 H. 8, and in *Rastell's Entries* 23, do not appear to have been adjudged. The same observation applies to the cases of *premunire* in 38 H. 6, *rot.* 36 and 9 H. 7. Indeed, these cases seem open to a more decisive objection, for it is impossible, consistently with any reasonable interpretation of the stat. 16 *Rich.* 2, *ch.* 5, or of any previous statute of *premunire*, to apply the words to the admiralty. The language of all of them is exclusively and directly pointed against the usurpations of the church of *Rome*; and there is not, as far as I have been able to trace, a single authority to support the dictum of Lord *Coke*, that a *premunire* lies against the admiralty.⁷⁴ Indeed, the extravagance of his doctrines on this subject cannot be better illustrated, than by his pertinaciously including any excess of jurisdiction by the court of chancery in the same penalty; an opinion, which has been long since exploded.

In respect to some other cases cited by him, it is impracticable to give any answer; because they are not so stated, as to present any particular points, and no reasons are assigned for the asserted judgments.⁷⁴ Even the case

⁷³ 4 *Inst.* 137, &c.

⁷³ 3 *Inst.* 120.—See *Buckley's Case*, 2 *Leo.* 182.—*Zouch.* 116.—*Ex-ton*, 261.

⁷⁴ See cases cited 4 *Inst.* 136, &c. and *Godb.* 261.

of *Burton vs. Put*,⁷⁵ on which he so strenuously relies, is the mere naked statement of a record; and to make it at all applicable to his purpose, Lord *Coke* gratuitously assumes, that the taking of the ships was actually in the haven of *Bristol*, within the ebb and flow of the tide, whereas the record itself, as quoted by him, only states the taking to have been "*infra corpus comitatus Bristolæ, et non super altum mare.*" It would seem also, that the ships were prizes taken out of the possession of the captors; for the taking is alleged to be with the plaintiff's prisoners and merchandises on board; and if so, whatever doubts might then exist, it is now clear that the admiralty had jurisdiction. Be this as it may, in as much as no reasons are given for the judgment, it cannot be admitted, that it warrants the inferences of Lord *Coke*. The action was founded on the stat. of 13 *Rich.* 2, enforced by 2 H. 4, ch. 21, which prohibits the admiral to meddle, but only of a thing done upon the sea, *according as had been done in the reign of Edw.* 3. If, at that time, the admiralty had jurisdiction over torts done on tide waters within ports, (as it seems to me incontestible it had) there could be no ground to support the action, if the taking was on tide waters in *Bristol*; and the verdict of the jury would fairly warrant an inference, that the taking was not in the haven of *Bristol* on such waters, but in some place out of the ebb and flow of the tide.⁷⁶ It is useless however to comment upon a case, the circumstances of which are not so stated, as to raise any distinct questions.⁷⁷

⁷⁵ 6 H. 6, rot. 303.—4 *Inst.* 137.

⁷⁶ *Zouch.* 116.

⁷⁷ It is not a little remarkable, that no actions founded on this statute, for an alleged *tort or trespass in ports*, are cited in the books, except this case, and two others (12 H. 6. rot. 123, 124.—4 *Inst.* 138, 139. which do not appear to have been adjudged. All the other cases reported are upon *contracts*. *Dyer* 159.—*Godb.* 385.—*Cro. Jac.* 603.—1 *Roll.* 415.—S. C. 3 *Bulst.* 205.—31 H. 6. in 4 *Inst.* 138. The prohibitions so frequent in the books were probably founded on the stat. 15 *Rich.* 2, ch. 3.

As to the dictum in 30 H. 6, 6, respecting the admiralty judges, that "the place and things of which they hold plea, are out of the realm,"⁷⁹ if it means to speak of the realm in its largest sense, it will include the British seas,⁸⁰ and is not law; if in a more narrow sense, as including only the bodies of the counties, it will be fully considered hereafter.

Let us now pass to the consideration of the reasons alleged, in the construction of the statutes of *Richard 2*, to exclude the jurisdiction of the admiralty in ports and havens, within the ebb and flow of the tide. As far as these reasons can be gathered from the imperfect light of reports, and from the laborious commentaries of Lord *Coke*, they resolve themselves into the following propositions. 1. That the body of every county includes all navigable salt waters, "where one may see what is done on the one part of the water and on the other, as to see from one land to the other." 2. That the sea is, *ex vi termini*, without the body of any county. 3. That all ports and havens are within the bodies of counties. 4. That where the common law hath jurisdiction it excludes the admiralty, and the common law hath jurisdiction in ports and havens.

In respect to the first proposition, it undertakes to define the boundary of a county on the sea coast at common law. The only authority in support of this definition is the opinion of *Stanton, J.* in 8 *Edw. 2*, already cited;⁸¹ for neither *Staundford*⁸² nor Lord *Coke* pretend to assert it upon any other ground. And even *Stanton, J.* does not state, that such waters are within the body of a county, but only that the coroner has jurisdiction there; and we have alrea-

⁷⁹ Le lieu et les choses dount ils tiendront plea sont hors del realme."

⁸⁰ *Co. Litt.* 259, b.—1 *Roll. Abr.* 523, l. 13.

⁸¹ *Fitz. Abr. Corone* 399.

⁸² *Staund. P. C.* 51.

dy shewn, that in early times coroners and sheriffs exercised a concurrent authority, even upon the high sea itself.⁶² Indeed Lord *Hale*, in quoting this very case,⁶³ considers it as no absolute proof; for he says, "an arm of the sea, which lies within the *fauces terræ*, where a man may reasonably discern between shore and shore, is, or *at least may be*, within the body of a county." And it is undoubtedly true, that by ancient grant or statute an arm of the sea may be within the bounds of a county; and perhaps as to all navigable rivers, where the tide ebbs and flows, since the stat. 15 *Rich.* 2, ch. 3, the admiralty jurisdiction may be well held to be excluded in all places *above* the first bridges next to the sea.⁶⁴ And this would be a satisfactory answer to the cases cited by Lord *Coke* in 7 H. 6, 22, 25.⁶⁵—16 H. 8.—35 H. 8, and 36 H. 8.⁶⁶ But to maintain that this is true by the mere force of the common law, something more is necessary than so imperfect a case as that of 8 *Edw.* 2, which, if ever, was adjudged at a time, when the jurisdiction of the common law was concurrent with the admiralty upon the high seas.⁶⁷ Besides, in *Violet vs. Blake*⁶⁸ this very case of 8 *Edw.* 2, was by the judges denied to be law, though it was affirmed in some other cases.⁶⁹

On the other hand, in Sir *H. Constable's* case,⁷⁰ it was expressly adjudged, as has been already stated, that the soil,

⁶² *Seld. de Dom. Mar. lib.* 2, cap. 14.—*Zouch.* 114.—*Spekm. Reliq.* 317.—2 H. P. C. 17, 18, 19.

⁶³ *De Portibus maris*, ch. 4, p. 10.

⁶⁴ *Eaton*, 127, &c. 2 H. P. C. 16, 17.

⁶⁵ This is probably a wrong citation, for there is no case at all applicable to the subject in the year book of that year.

⁶⁶ 4 *Inst.* 139, 141.

⁶⁷ *Zouch* 114.—*Seld. Dom. Mar. lib.* 2, cap. 14, p. 156, 560, 106.—*Andr. R.* 231.—*Eaton*, 155.

⁶⁸ 2 *Roll.* 49.

⁶⁹ *Owen* 122.

⁷⁰ 5 *Co.* 106, &c.

on which the sea ebbs and flows, may be parcel of a manor, and that, when the sea flows and has *plenitudinem maris*, the admiral shall have jurisdiction of every thing done on the water, between the high and low water mark, by the ordinary and natural course of the sea; and yet, when the sea ebbs, the land may belong to a subject, and every thing done on the land, when the sea is ebbcd, shall be tried at common law, for it is then parcel of the county, and *infra corpus comitatus*; and so, between the high and low water mark, the common law and the admiralty have *divisum imperium*. It is probable that the court meant here to speak of land on the open sea coast; but it is very difficult to perceive, why the same principle should not apply as to the tide waters in ports of the sea. If land on the sea coast when the tide is out, be to low water mark within the body of the county, and yet, when the tide is at the flood, it is deemed within the admiralty jurisdiction, because it is then the sea, why should not the same doctrine apply to the ebb and flow of the tide in ports and havens? Until some strong reason can be assigned for a distinction, it would seem more conformable to law and nature to hold, that the bodies of counties, bounding on navigable waters, are limited at all times by the line of the sea tide; and this is the doctrine asserted by the admiralty.²¹

In the next place, it is asserted, that the sea, *ex vi termini*, imports salt water without the body of a county, by the definition of the common law. The authority principally relied on, to support this position, is the case in *Edward the first's time*.²² That case has been already fully considered, and it is clear, that it does not, in any manner,

²¹ *Eston*, ch. 3, p. 80.—ch. 4, p. 87.—ch. 8, p. 121.—*Zouch*, 110.—*Lacy's Case*, *Moore* 121.—But see 2 *East. P. C.* 803.—*Bac. Abridg. Courts of Admiralty A.*

²² *Fitz. Abr. Avowry*, 192.—4 *Inst.* 140—12 *Co.* 79.

warrant the assertion. On the other hand, Lord Hale,⁶⁶ in defining what the sea is, says, that it is either, that which lies within the body of the county or without; that arm, or branch of the sea, which lies within the *fauces terræ*, and is, or at least may be, within the body of a county; that part, which lies not within the body of a county, is called the *main sea*, or ocean.⁶⁷ And his Lordship is well warranted in this distinction or definition by authority. Besides the cases already cited (in 22 *Assis.* 93 and 5 *Co.* 107) it was held by Choke, J. in 8 *Edw.* 4. 19 (and his opinion was approved in 5 *Co.* 107) that where the sea ebbs and flows over land, when it flows, it is then *parcel of the sea*. And in *Barber vs. Wharton*,⁶⁸ the Court held, that a contract, alleged to be made *infra fluxum et refluxum maris*, might be on the *high sea*, and was so, if the water was at high water mark. It should have been called, in accuracy of language, "the sea," because the "high sea," or "main sea," (*altum mare*, or *le haut meer*) properly begins at low water mark.⁶⁹ And so is the unquestionable distinction of the admiralty.⁷⁰ Nor is this distinction unimportant. The statute of 13 *Rich.* 2. *ch.* 5. prohibits the admiral to meddle, except of things done on the sea ("sur le meer") which includes the ebb and flow of the tide on the seacoast, and, as the admiralty contends, in ports and havens also; whereas Lord Coke, and the common lawyers, perpetually construe the exception of the statute, as though it were "high sea" (*altum mare*, *le haut*

⁶⁶ *De portibus maris*, *ch.* 4, p. 10.

⁶⁷ Lord Hale manifestly considers, that the mere circumstance, that the place is within the body of a county, does not exclude the admiralty jurisdiction, for, after speaking of the narrow sea, as being within the body of a county or without, he adds, that, in this sea, the king exercises his right of jurisdiction ordinarily by his admiral.—*De Port. Mar.* *ch.* 4.

⁶⁸ 2 *L. Ray.* 1452.

⁶⁹ 1 *Bl. Comm.* 110.

⁷⁰ *Eaton*, *ch.* 3, 4, 5, &c.

meer) and assert, "that where a place is covered over with salt water, and not of any county or town, there it is *altum mare*, but where it is within the county, it is not *altum mare*."⁹⁸ In fact, what is "the sea," or the "high sea," has nothing to do with the bounds of counties, but is ascertained by high and low water mark, on the sea coast; and, by parity of reason, it should be the same in ports and havens.⁹⁹

The third proposition is, that all ports and havens are within the bodies of the counties of the realm. By ports and havens, as the words are here used, are meant, not merely port or haven towns, but all the tide waters included within the harbours and franchises. This proposition is attempted to be sustained as an inference from the prior propositions, and from the authorities already stated,¹⁰⁰ which have been fully considered and answered. All the subsequent cases, from the earliest to the latest, profess to proceed upon these authorities, feeble and inconclusive as they must be confessed to be.¹ Indeed, some of these cases² are perfectly consistent with the claims of the admiralty, for, since the statute 13 Rich. 2, ch. 5, it is admitted, that the admiralty has no jurisdiction in rivers, above

⁹⁸ *Leigh vs. Burley, Owen* 122.—*Constable's case*, 5 Co. 106.—1 H. P. C. 424.

⁹⁹ See *Godfrey's case, Latch*. 11. *Hale de Port*. ch. 4, p. 10.

¹⁰⁰ *Fitz. Avonry* 192.—*Id. Corone* 399.—*Id. Conisance* 36.

¹ *Leigh vs. Burley, Owen* 122.—*S. C.* 2 Brownl. 37.—*Violet vs. Blague, Cro. Jac.* 514.—*S. C.* 2 Roll. 49.—*Moore* 891.—*Willet vs. Newport*, 1 Roll. 250.—*Dorrington's case, Moore* 916.—*Trinity House vs. Boreman*, 2 Brownl. 13.—*Buller vs. Thayer*, 2 Brownl. 29.—*Goodwin vs. Tompkins, Noy. R.* 148.—*Tusker vs. Gale*, 1 Roll. Abrid. 533. l. 19.—*Feltham vs. Ormsley*, 3 T. R. 315.—The doctrine in *Moore* 891, "that the coasts, shores, and harbours, are all out of the power of the admiral, except in the two cases allowed specially in statute 15 Rich. 2." is not law; for it is clear, that on the sea coasts, as far as the tide flows, the admiralty hath jurisdiction, when the sea is full.

² *Noy* 148, *Cro. Jac.* 514, and 3 T. R. 315.

the first bridges next to the sea, and the places on the *Thames*, mentioned in these reports, would therefore be excluded.

The fourth proposition is, that where the common law hath jurisdiction, it excludes the admiralty; and the common law hath jurisdiction in ports and havens. This proposition also rests on the same authorities, as the preceding.³ It has been already shewn; that the common law originally had jurisdiction on the high seas, concurrent with the admiralty; and the exercise of that jurisdiction would be just as conclusive against that of the admiralty on the *high seas*, as it is now assumed to be in ports and havens. It is certain, that the admiralty did anciently take cognizance of suits in ports, and, if the common law did the same, the only reasonable inference is, that the cognizance was concurrent.⁴ And it is hardly necessary to repeat, that the authorities relied on do not warrant any different doctrine. Indeed it never was true, and is not now true, that the jurisdiction of the common law excluded that of the admiralty. In cases, now manifestly within the admiralty jurisdiction, the common law claims a concurrent cognizance, as will be abundantly shewn hereafter.⁵

In confirmation of the doctrine of the common law, which excludes the admiralty from cognizance of things done in ports and havens, the provisions of the statute of 2 H. 5. ch. 6. and 27, *Eliz.* ch. 11, have been cited. The statute of *Eliz.* provides, that such of the offences therein mentioned, as shall be done on the *main sea*, or *consists of the sea*, being no part of the body of any county of the realm,

³ *Fitz. Avonry* 192.—*Conisance* 36, *Corone* 399.

⁴ *Zouch*, 113, *Hale De Portubus*, ch. 7, p. 88.

⁵ Since the statute 28, H. 8, ch. 15, the courts of common law still claim concurrent jurisdiction of the offences stated in that statute, committed in creeks and arms of the sea. (2 H. P. C. 18—54.)

and without the precincts, &c. of the cinqueports, shall be tried and determined before the Lord High Admiral, and other justices of *oyer and terminer*, according to the form of the statute of 28 H. 8. ch. 15. And so (says Lord Coke)⁶ by the judgment of the whole parliament, the jurisdiction of the Lord Admiral is wholly confined to the main sea, and coasts of the sea, being no parcel of any county of the realm. To this remark it has been very properly replied. 1. That the jurisdiction here conferred is not on the admiralty, but on the high commission court. 2. That several of the offences, stated in the statute, are such, as never were within the admiralty jurisdiction.

The statute of 2 H. 5. ch. 6., commonly called the *statute of truces*, gives power and authority to the conservators of truces, appointed by that act, "to inquire of all such treasons and offences against the truce and safe conducts upon the main sea (*sur le haut meere*) out of the bodies of the counties, and out of the franchises of the cinqueports, as the admirals of the kings of England, before this time, reasonably, after the old custom and law on the sea (*sur le meer*) used, have done or used;" and as to similar offences committed within the body of the counties, the conservator, and two commissioners joined with him, are to make inquisition. So far as this statute may have been argued to disprove the jurisdiction of the admiralty in ports, it admits of a decisive answer. 1. That the jurisdiction is special, and no more disproves the admiralty jurisdiction in ports, than on the high seas; or than that of the common law over offences against truces committed on land. 2. That, by this statute, the breaking of truces is declared treason, and is punishable, in the manner stated in the statute, by a special court; but it

⁶ 4 Inst. 137.

cannot, by implication, oust either the common law or admiralty of its jurisdiction over any other offences. 3. That if the argument could prevail, it would oust the jurisdiction of the admiralty over homicides and mayhems committed in great rivers beneath the first bridges, which has never been pretended.

Indeed, the argument derived from the collateral provisions of statutes, is generally unsatisfactory, and rarely conclusive; and if there be any weight in the present one, as an exposition of the true jurisdiction of the admiralty since the statutes of *Richard II.*, it is completely counterpoised by other statutes. The statute 28 H. 8. ch. 15, gives the high commission court (created by that act, and of which the admiral is the chief judge) jurisdiction of all "treasons, felonies, murders, and confederacies, thereafter to be committed in or *upon the sea*, or in any other haven, river, creek, or place, where the admiral or admirals *have, or pretended to have* power, authority, or jurisdiction." And it has been argued, that this is a complete recognition of the admiralty jurisdiction in all ports and havens. Lord *Coke* has attempted to evade the force of the argument, by assuming, that the words, "or pretend to have," &c. are to be understood between the high water mark and low water mark; for though the land, at the reflow, be within the county, yet, when the sea is full, the admiralty has also jurisdiction as low as the sea flows; but, that the words extend not to any haven, river, creek, or place, that is within the body of the county.⁷ This construction is perfectly gratuitous, and is unsupported by the words of the statute. There never was any question, that the admiral had jurisdiction within the ebb and flow of the tide on the sea coast. The only controversy, at the time of pass-

⁷ See *Leigh vs. Burley, Owen* 132.—3 Inst. 113.

ing the statute, was, whether he had jurisdiction in ports and havens, and it is certain, that he always did "pretend to have" jurisdiction there. And the statute, so far from negating this claim, declares in the alternative, that he *has*, or *pretends to have*, the jurisdiction. Lord Hale, in commenting on this passage in the statute,⁸ says, "This seems to me to extend to great rivers, where the sea flows and reflows, below the first bridges, and also in creeks of the sea, at full water, where the sea flows and reflows, and upon high water upon the shore, *though these, possibly, be within the body of the county*; for there, at least, by the statute 15 Rich. 2, *they* (the admirals) *have a jurisdiction*; and thus, accordingly, it hath been *constantly used at all times*, even when the judges of the common law have been named in the commission; but we are not to extend the words "pretend to have," to such a pretence, as is without any right at all, and, therefore, although the admiral pretend to have jurisdiction upon the shore, when the water is reflowed, yet he hath no cognizance of a felony committed there." And in *Lacy's case*,⁹ an indictment before the high commission court was held good for a murder committed at *Scarborough sands*, though it was alleged to be done "within the ebb and flow of the tide in *Scarborough*, and to be parcel of the port of *Scarborough*," and, as some of the reports shew, expressly upon the ground that the jurisdiction of the high commission court extended to such places.¹⁰ And, it may be added in confirma-

⁸ 2 Hale, P. C. 16.

⁹ 2 Hale, P. C. 19.—S. C. 1 Leo. 270, and Moore 121, and see Owen, 122.

¹⁰ 1 Leo. 270.—Moore 121.—Lord Hale's explanation of this judgment (2 H. P. C. 20.) does not seem to comport with the grounds of the decision, as stated in *Leonard* and *Moore*. In both reports, the case is put upon the point, that it was within the jurisdiction of the high commission court, under statute 23 H. 3, and not (as Lord Hale

tion, that the commissions, issued upon this statute, have uniformly authorized inquisitions of all felonies, "super mari, vel aliquo rivo; portu, aqua dulci, creca, seu loco quocunque infra fluxum maris ad plenitudinem maris a quibuscunque primis pontibus versus mare et super littus maris, etc. secundum stylum et consuetudinem regni Angliæ et curiæ admiralitatis."¹¹ And the judicial writs, issued by the high commission court, from time to time,¹² and the statute of 11 and 12 *Wm.* 3, ch. 7, in *pari materia*, seem to put this construction beyond all question. The statute of 28 *H.* 8, does, therefore, warrant a strong inference, that, at the time of its passage, it was understood as law, that the admiralty had jurisdiction upon tide waters, in ports, havens, and creeks of the sea. And Lord *Hale's* exposition of this statute, and his affirmation of the admiralty jurisdiction in these places, in contradiction to Lord *Coke*, has been very recently and solemnly recognised by

supposes) the death being on land, by virtue of any common law commission. In the report in *Moore*, 121, the following additional opinion is imputed to the court, that "by the statute 13 *Rich.* 2, ch. 5, the admiral himself is prohibited to intermeddle with any thing within the body of the county, as all havens are, and, on that account, havens are not within the admiralty; yet all the land, upon which the water of the sea flows and reflows, is within the jurisdiction of the admiralty." This remark, in its obvious purport, seems to recognise the doctrine of the admiralty, that it has not jurisdiction in ports and havens, as such, and over the ports and haven towns, but only so far in the ports, &c. as the sea flows; and, if this be the true meaning, it seems to coincide with that avowed by Lord *Hale*, 2 *H. P. C.* 17.

¹¹ 2 *Hale*, *P. C.* 18.—The words of the commission are given somewhat differently by *Zouch*, 112. The jurisdiction is thus described:—"Tam in aut super mari aut aliquo portu, rivo, aqua dulci, creca seu loco quocunque, infra fluxum maris ad plenitudinem, a quibuscunque primis pontibus versus mare, quam super littus maris et alibi ubicunque infra jurisdictionem nostram maritimarum aut limites admiralitatis regni nostri et dominiorum nostrorum." And see *Zouch*, 93, and 2 *East. P. C.* 795, and Sir *L. Jenkins'* charge, 91, 92.

¹² *Eston*, ch. 17, p. 245, &c.

the twelve judges of *England*, and sentence of death passed in pursuance of that opinion.¹³

It may be well, in this connexion, to take notice of another doctrine of the common law, *vis.* that where an act is done partly upon the land and partly upon the sea, the admiralty is excluded. Hence it is said, that if a ship be taken at sea, and carried to a port within the body of a county, the admiralty loses its jurisdiction.¹⁴ It is difficult to comprehend what an act is, that can be done partly on the sea and partly on the land; and still more difficult to perceive, how the bringing the property *infra præsidia*, (if I may so say) can deprive the admiralty of its jurisdiction. The *corpus delicti* still remains, and, until the property is so brought within the power of the Court, it would seem impracticable to exercise any jurisdiction at all; and it would be strange, indeed, if the only circumstance, which would render the jurisdiction effectual, should take it away. The statute 13 *Rich.* 2, ch. 5, allows the admiralty cognizance of things done upon the sea, and yet, upon this construction, it would be entirely lost or useless. It is utterly impossible to support such an opinion; and, accordingly, it has been in other cases qualified or abandoned.¹⁵ Other distinctions, however, have sprung up in its room, to defeat the claims of the admiralty. It has been held, that if the tort be done at sea, and afterwards the property be changed by a sale on land; or, if the tort be not one continuing act, but be severed by the intervention of new parties, the jurisdiction of the admiralty is gone.¹⁶ These distinctions have, in their turn, been denied, and, after a very severe

¹³ *Bruce's case*, 1812, 2 *Leach C. C.* (4th edition) 1493.—See also *Coombe's case*, 1 *Leach C. C.* 388.

¹⁴ 4 *Inst.* 140.—12 *Co.* 79.

¹⁵ 1 *Roll. Abr.* 533, l. 13.

¹⁶ *Spanish Amb. vs. Jolliffe*, *Hob.* 78.—*Com. Dig. Adm. F.* 5.—2 *Bro. Adm.* 118.

and doubtful conflict, the reasonable doctrine seems now established, that, where the tort is done at sea, the jurisdiction of the admiralty is not defeated by any subsequent transaction on land, or by any concurrent jurisdiction of the common law.¹⁷ And, it may be added, that this is the unquestionable doctrine in the *United States*.¹⁸

We have now considered the principal, if not all the reasons, which the courts of common law have advanced, to exclude the admiralty from jurisdiction in ports and havens.

On the other hand, the admiralty has strenuously contended, that the statutes of *Richard II.* never intended to deny the jurisdiction in ports and havens, within the ebb and flow of the tide, and in great streams beneath the first bridges. It fortifies its pretensions by the consideration, that such was its undoubted jurisdiction in the reign of *Edward III.*, to which the statute of 13 *Rich.* 2, ch. 5, appeals for a determination of its authority; that this is the only statute, speaking affirmatively in respect to the admiralty jurisdiction, declaring it to extend to things done upon the sea; and that the sea (which includes all waters as far as the tide flows) never was within the body of any county; that long after the statutes of *Richard II.*, the admiralty continued to exercise jurisdiction in ports and havens;¹⁹ that it was recognized by the courts of common law upon writs of *procedendo* and consultation, in the reigns of *Henry VIII.* and *Elisabeth*,²⁰ by acts of parliament, and especially by statute 28 *H.* 8, ch. 15—32 *H.*

¹⁷ 1 *Vent.* 308.—*Radley vs. Egglefield*, 1 *Vent.* 173.—*S. C.* 2 *Saund.* 259.—*Cro. Eliz.* 635.—1 *Roll. Abr.* 530, l. 40.—*Com. Dig. Adm. F.* 5 and 6.

¹⁸ *Ross vs. Himely*, 4 *Cranch*, 241.

¹⁹ *Exton*, ch. 17, p. 255.

²⁰ *Exton*, chs. 3, 10, 11, 12, 13, 17, 18, 19, and 20, p. 80 to 276.

8, ch. 14, and 1 *Elis. ch. 17.*; ²¹ that it is confirmed by the forms of the commissions of the Lord High Admiral, which, notwithstanding the statutes of *Richard*, have, for ages since, continued to include jurisdiction in ports and havens, and rivers beneath the first bridges; ²² and, finally, that it seems admitted in 1632, by the concurrent opinion of all the twelve judges. ²³ These pretensions, too, have been deliberately adopted by Sir *H. Spelman*; for he says, ²⁴ “the place absolutely subject to the jurisdiction of the admiralty is the sea, which seemeth to comprehend public rivers, fresh waters, creeks, and surrounded places whatsoever, within the ebbing and flowing of the sea at the highest water, the shore or banks adjoining, from all the first bridges seaward.” Lord *Hale* seems to admit the same doctrine; ²⁵ and it has been solemnly recognized and enforced (as we shall hereafter see) by the Congress and the Supreme Court of the *United States*. ²⁶

We are next led to the consideration of the jurisdiction of the admiralty over contracts. And here it is held by the courts of common law, that the jurisdiction is confined to contracts made upon the high sea, to be executed upon the high sea, of matters in their own nature maritime.

²¹ *Exton*, ch. 5, p. 104—ch. 20, p. 270.—*Zouch*, 112.

²² *Zouch*, 92.

²³ “Likewise, the admiral may inquire of, and redress all annoyances and obstructions, in all navigable rivers beneath the first bridges, that are impediments to navigation, or passage to or from the sea, and, also, to try personal contracts and injuries there, which concern navigation on the sea.”—*Exton*, 404—*Zouch*, 122—Agreement in 1632.

²⁴ *Spelman Reliq. Adm. Jurisd.* 226.

²⁵ 2 *Hale*, P. C. 16.—*Hale De Port.* ch. 7, p. 83.

²⁶ In *Godfrey's case* (*Latch* 11) the opinion of *Doddridge, J.* seems to assert, that the sea extends to tide waters in ports, for, when he speaks of a contract made on board of a ship at anchor, and says it is then made on the sea, he probably means at anchor in port.

These restrictions purport to be founded upon the construction of the statutes of *Richard II.*, and more especially on that of 15 *Richard II.* ch. 3. There is, as we have already seen, no authority for them in any antierior reign; and it is certain, that before *Richard's* time the admiralty did openly assert and exercise jurisdiction over maritime contracts. The statute of 13 *Rich. II.*, ch. 5, is the only one, which (as has been already stated) speaks in affirmance of the admiralty jurisdiction, and it allows it of "things done upon the sea." It is difficult, looking to the obvious intent of this statute, as explained in the preamble, and more fully in the petition, to which it was a response;²⁷ to believe, that it meant to abridge the jurisdiction then claimed by the admiralty, except as to things on land within the ports of the realm. It meant to check its usurpations, and not to narrow its ancient rightful authority. And as to cases without the mischiefs of the statute, as contracts beyond seas, on which the common law would then afford no remedy, and disclaimed jurisdiction, there was no reason to extend the meaning of the enacting clause, so as to embrace them. And such for some time was the construction adopted in practice.²⁸ The words, however, are not "things done upon the sea" absolutely, but according to the usage in the time of *Edward* the third. And we have seen that, at that time, the sea comprehended the waters in ports, as far as the flood tide extended; and that maritime contracts were enforced in the admiralty. The true interpretation then of the words "things done upon the sea," in this connexion, would seem to be all things done touching the sea, i. e. maritime affairs in general; and this is the approved interpretation asserted by the admiral-

²⁷ *Exton*, 289, 290, &c.

²⁸ *Tucker vs. Cappe*, 2 Roll. R. 497.

ty.²⁰ Nor let it be deemed a strained or unnatural construction of the words. It is adopted by *Selden* in respect to similar expressions in an ordinance respecting the jurisdiction of the admiralty of *France*. The ordinance uses this phrase, "pour raison ou occasion de faict de la mer,"²⁰ "id est, (says *Selden*,) ob causam aliquam a re maritima ortam."²¹ *Valin* too recites several ordinances of *France* respecting the jurisdiction of the admiralty, and particularly one about this very period, (*Ordin.* of 1400,) which gives (*art.* 3,) "connoissance et jurisdiction de tous les faits de la mer, et des dependences criminellement et civilement;" and again (*art.* 20,) "de choses dependants de la mer," which expressions he does not scruple to declare as a grant of jurisdiction over all maritime contracts. He adds, that the judges of the admiralty have always of right, from the very nature and object of their institution, possessed cognizance of them; and this, not only as to contracts then in use, but as to all other contracts of a maritime nature.²² *Valin*, therefore, affords a distinct authority in favour of this exposition of the words of the statute, for there is no substantial distinction between "choses faits sur la mer" and "faits de la mer;" and this too in a similar controversy as to jurisdiction between the rival courts of *France*, contested with as much zeal, as it has been in *England*.

But if we waive this interpretation, which rests on the reference to the usage in the time of *Edward III.*, and if we reject this reference altogether, (which in common reason we are not at liberty to do) still, in the most literal and

²⁰ *Zouch*, 103.—*Exton*, 321.

²¹ The words of the statute of *Rich. II.* are "choses faits sur la mer."

²² *Seld. de Dom. Mar. lib.* 2, cap. 18, p. 169.

²³ *Valin, Comm.* 124.

rigid sense of the terms, "things done upon the sea," the admiralty must have jurisdiction in all cases of maritime service and labour, for these are strictly done upon the sea. And whether the contract or engagement be made at land or not is immaterial, since the service is actually performed upon the sea, and the jurisdiction attaching to the service, the other things are but incidents. We shall presently see, how far the common law courts have adopted this or any other consistent construction of the statute.

Let us now recur to that, which should principally engage our attention, *vis.* the stat. of 15 Rich. II., ch. 3. It prohibits the admiralty from taking cognizance of "all manner of contracts, pleas and quereles, and all other things, done or arising within the bodies of counties, as well by land as by water." The whole question, as to the extent of this prohibition, turns upon the legal meaning of the words "contracts, pleas and quereles arising within the bodies of counties," for no particular stress can be laid upon the word "done," as in every fair construction it must refer to its next antecedent, "other things." In respect to "quereles," if by this word be meant torts or injuries *in rem*, or *in personam*, the jurisdiction would seem limited to the place where the act is done, for there it may be said properly to arise. If "complaints or controversies" be meant, (as would seem to be the critical sense) the place where they arise must depend upon the subject matter; if torts or injuries *in rem*, they arise, where the acts are done; if contracts or personal rights, they arise where the performance or breach of performance, or other invasion of right, takes place. The same observation applies to "pleas" or actions, for *ex facto jus oritur, et actio oritur ex delicto*. In a more enlarged sense, "controversies, pleas and actions" arise, where the law has appointed the *forum* competent to try them. Such are the *forum rei*

sita, the *forum domicilii*, the *forum maleficii*, &c. which depend upon the municipal regulations of each particular country.³³ In respect to "contracts," these may be said to arise, where they originate or are made, or, with equal propriety, where they are to be executed or performed. So it is laid down in the civil law, "*contraxisse unusquisque in eo loco intelligitur, in quo ut solveret se obligavit*;"³⁴ "*contractum autem non utique eo loco intelligitur, quo negotium gestum sit, sed quo solvenda est pecunia*."³⁵ *Huberus*³⁶ asserts the same doctrine; "*non eum esse locum contractus semper, ubi negotium inter partes celebratum, sed ad quem contrahentes respexerunt*." The common law has adopted the same doctrine, for it construes a contract by the law of the place, where it is to be performed or executed, and not simply the place of its origin. And it now sustains actions in its own courts upon foreign contracts, solely upon the ground, that such contracts are not local, but exist or arise in every place, where the debtor is found. It proceeds yet farther, and takes cognizance of torts and injuries to persons and property without the realm, both upon the high seas and in foreign countries, upon the ground that they are not local, but arise wherever the party resides. And in this respect it seems to have adopted the doctrines of the civilians.³⁷

It is utterly impossible to reconcile the decisions of the courts of common law with the construction of the stat. of 15 Rich. II., ch. 3, here stated, or indeed with any other

³³ See *Pothier's Pandects*, lib. 5, tit. 1, s. 35, &c.

³⁴ *Dig. lib. 44, tit. 7, l. 21*.—2 *Ejner*. 331.

³⁵ *Dig. lib. 42, tit. 5, l. 3*.—*Exton*, 323.—*Hein. Element. Pandect. pars. 2, s. 38*.

³⁶ *De foro compet. s. 53*.

³⁷ *Hub. de foro compet. s. 57, p. 731*.

construction warranted by the words of the statute or by consistent principles of interpretation.

Let us now proceed to consider these various decisions. And, in the first place, it is held, that the admiralty has no jurisdiction over matters done upon land in foreign parts.³⁸ It ought to be observed, that the admiralty never did claim, as of right, the cognizance of torts or injuries *in rem* or *in personam* in foreign countries, nor of contracts made there, which were not of a maritime nature. It may sometimes have entertained suits of a different kind; but the limit, which upon principle it has prescribed to itself, has been to decline all jurisdiction except of foreign maritime contracts.³⁹ The principal ground, upon which the common law proceeds to enforce this restriction, is that by the statute of 13 *Richard II.*, ch. 5, the admiralty is confined to things done upon the sea. It has been already submitted, that this is not a necessary construction, for the principal object of that statute was to prevent the admiralty from intermeddling with things done within the realm, and that it did not mean to abridge its ancient rightful jurisdiction, but left it as it was in the time of *Edward III.* It is incontrovertible, that at that period the admiralty had cognizance of foreign maritime contracts, for in the ordinance of *Edward I.* at *Hastings*, (already quoted) it is given in express terms.⁴⁰ So reasonable did it in fact appear to allow this jurisdiction as to foreign contracts, that there is a string of adjudications each way. In *De la Broche vs. Barney*,⁴¹ upon a suit in the admiralty, upon an obligation supposed

³⁸ 4 *Inst.* 134, 139.

³⁹ Upon this ground, the cases of the *Spanish Amb. vs. Points*, 2 *Bull.* 322, S. C. 1 *Roll. R.* 133. and *Don Alonso vs. Cornaro. Hob.* 212, S. C. 2 *Brownl.* 29, and *Empringham's Case*, 12 *Co.* 84. may consistently with the rightful claims of the admiralty, be held good law.

⁴⁰ *Clerke's Prax.* 143, 144.

⁴¹ 31 *Elix.* 3 *Leon.* 232.

to be made and delivered in *France*, the whole court held in effect, that the admiralty had a concurrent jurisdiction with the common law over foreign contracts. This doctrine was affirmed in *Furnes vs. Smith*;⁴² and notwithstanding diverse intermediate contrary cases,⁴³ it was again, after solemn debate,⁴ deliberately held in *Tucker vs. Jones*;⁴⁴ it was conceded in the agreements of the judges in 1575, and of the twelve judges in 1632;⁴⁵ it was again debated in *Cremmer vs. Tookley*;⁴⁶ and, finally, in the last cases reported in the books, was denied, and the point of jurisdiction adjudged against the admiralty.⁴⁷

In this conflict of opinion, it may not be unfit to entertain such a doctrine, as comports best with the principles,

⁴² 11 Car. 6 Vin. Abr. 517, pl. 3.—S. C. 1 Roll. abrid. 530, l. 39; and see *Spanish Amb. vs. Plage*, Moore 814—and *Blaney vs. Cotton*, 2 Roll. R. 486.

⁴³ *Thomlinson's case*, 12 Co. 104.—4 Inst. 139.—*Palmer vs. Pope*, Hob. 79, 212.—*Bridgeman's case*, Hob. 11.—S. C. Moore 918.—*Anon.* 2 Brownl. 16.—*Jennings vs. Audley*, 2 Brownl. 30, S. C. Hob. 79, 213.—*Tourson vs. Tourson*, 1 Roll. R. 80, S. P. 2 Brownl. 34.

⁴⁴ 1 Roll. R. 492, 497.

⁴⁵ In the agreement of 1575, it stands thus: "That the judge of the admiralty, according to such ancient order, as hath been taken "by King Edward I. and his council, and according to the letters patent of the lord high admiral for the time being, and allowed by other kings of the land ever since, and by custom time out of memory of man, may have and enjoy cognition of all contracts and other things, rising as well beyond as upon the sea, without let or prohibition." In the agreement of 1632 it stands thus: "If suit be commenced in the court of admiralty upon contracts made, or other things personally done, beyond or upon the seas, no prohibition is to be awarded." *Zouch*, 121, 122. *Ex-ton*, 443.—So much, indeed, was the right to entertain suits upon foreign maritime contracts deemed as of course in the admiralty, that in *Clerke's Praxis*, (tit. 41) the mode of proceeding is pointed out without any intimation of doubt. "Aliquando etiam factor, vel negotiorum tuorum gestor in partibus transmarinis, signavit tibi quædam bona ad tuum usum vel commodum, alius tamen ea detinet, vel injuste occupat, in his casibus obtinere potes warrantum," &c. &c.

⁴⁶ *Godbolt*, 385, S. C. *Latch*, 138.

⁴⁷ *Ball vs. Trelawny*, Cro. Car. 603.—*Jurado vs. Gregory*, 1 Vent. 32.—S. C. 1 Lev. 267, 2 Keble, 511.

which ought to regulate the subject. Considering then, that the admiralty, from the highest antiquity had this jurisdiction; that it was the only court, which, as the law was then understood, could enforce foreign contracts; that the statute of *Richard* was made on a special occasion, to check the encroachments of the admiralty; that the language of that statute, "*choses faits sur la mer*," may well admit the interpretation asserted by the admiralty, *vis.* such things as are of a maritime nature, and more especially, as that was the rightful usage of the admiralty in the reign of *Edward III.*, which is incorporated into the very exception of the statute; considering also that the admiralty continued to exercise that authority for two centuries after the passage of the statute, and that there is a great weight of common law authority in its favour, it does not seem unfit to hold, that the admiralty has cognizance of all foreign maritime contracts.

There is this additional circumstance of great importance, that it is the only construction, upon which whole classes of cases, still acknowledged to be within the admiralty jurisdiction, can be sustained or reconciled with principle. I allude to the right to entertain suits, 1. To enforce the judgments of foreign admiralty courts. 2. To proceed *in rem* upon bottomry bonds executed in foreign parts. In neither case can there be the slightest pretence, that the things are "done upon the sea;" or "arise upon the sea," in the sense affixed to these terms by the common lawyers. Yet in both these cases the authority of the admiralty has been admitted in the most ample manner;" and in a recent case of bottomry triumphantly upheld against every objection." These melancholy remains of

⁴⁰ *Com. Dig. Adm. E. 10, 17.*

⁴¹ *Menetons vs. Gibbons, 3 T. R. 267.*

its former splendour stand upon the ancient foundations of the admiralty before the reign of *Richard II.*, and if they have survived the assaults of enmity and time, it is because the principles, on which they rest, are solid and immoveable.⁵⁰

In the second place, it is held that the admiralty has no jurisdiction, where the contract is made *at sea* to be executed *upon land*. One reason of this is said to be, that in such cases the courts of common law may entertain suits, and where they can, they exclude all other courts.⁵¹

The doctrine, that the admiralty is ousted by a concurrent jurisdiction of the common law, would, if true, completely destroy its authority in all cases, except of prize; for, in all others, the common law has now acquired or claimed a concurrent jurisdiction. It cannot, therefore, be maintained. There would be a much stronger reason for contending, upon sound principles, that, where the admiralty possessed jurisdiction, the common law ought to be excluded.

As little foundation is there for the suggestion, that this is a proper construction of the statute of 15 *Rich. II.*, ch. 3. Contracts made at sea certainly "arise" there in the sense

⁵⁰ One argument, and indeed a principal one, urged by Lord *Coke* against the admiralty jurisdiction over foreign contracts, is that they are cognizable by the court of the Lord Constable and Marshal, commonly called the court of chivalry. This argument is a full illustration of Mr. Justice *Buller's* remarks on Lord *Coke's*, 4 *Inst.* 134, respecting the admiralty. By the stat. of 13 *Rich. II.*, ch. 2, the jurisdiction of the court of the Lord Constable and Marshal is expressly limited to consue "of contracts and deeds of arms and of war out of the realm, and also of things which touch war within the realm." Hence it is very clear, that it has cognizance of such contracts only as touch deeds of arms and war. (*Zouch*, 119.—2 *H. P. C.* 33.—3 *Bl. Comm.* 68;) and consequently its jurisdiction over all other foreign contracts is excluded.

⁵¹ 4 *Inst.* 142.—*Anon.* 2 *Brownl.* 16.—*Thomlinson's case*, 12 *Co.* 104.—*Tucker vs. Cappe*, 2 *Roll. R.* 492, 497.—*Com. Dig. Adm. F.* 5 and 6.—*Hale Hist. C. L.* 31.—3 *Bl. Comm.* 106.

of the term assumed by the common law, and the admiralty jurisdiction ought therefore to attach. And so the court, in an anonymous case in *Cro. Elix.* 685, held, and said, that when the original cause ariseth upon the sea, and other matters happen upon the land depending upon the original cause, those matters, although done upon land, shall be tried in the admiralty; and this decision was approved in a still later case.⁵² Nevertheless, against the words of the statute and the reason of the thing, the courts of common law have not hesitated to disavow this at least consistent doctrine.

It is in the next place held, that if a contract be made at sea upon a subject not maritime, or be under seal, or be afterwards sealed upon land, the admiralty has no jurisdiction.⁵³ Consistently with the interpretation put upon the statutes of *Richard II.*, by the common law, these distinctions ought not to prevail, for the contracts "arise" upon the sea, and are "things done upon the sea;" and there is not a word in the statutes annexing any qualification, as to the nature, objects or form, of the things done upon the sea. And so is the opinion held by Lord *Holt* in *Collins vs. Jessot*,⁵⁴ where he asserts, that the admiralty has jurisdiction in respect to the locality of the cause of action, let the nature of the action be what it will. The doctrine,

⁵² *Spark vs. Stafford*, *Hard. R.* 183. In this case, there was a suit in the admiralty by the master of a ship against the owner, to recover the amount of a ransom for the ship, which was taken at sea by pirates, and the ransom money was paid by the master on land. Of course the suit was upon an implied contract of the owner arising from a payment on land for his benefit. The court denied a prohibition, "because the original cause of action arose upon the sea, and whatever followed was but accessory and consequential, and therefore well determinable in the court of admiralty." See also *Godfrey's case*, *Latch*, 11.

⁵³ *Bridgman's case*, *Hob.* 11.—*S. C. Moore*, 918.—*Palmer vs. Pope*, *Hob.* 79, 212.—3 *Salk.* 23.

⁵⁴ 6 *Mod.* 155.

however, which we are now considering, abandons this test of jurisdiction, and so far as it regards the nature of the contract, maritime or not, rests wholly upon the exposition of the statute asserted by the admiralty; and is inadmissible in every other view. As to the effect of a seal in ousting the jurisdiction, we shall have occasion more fully to consider it hereafter.

Another and leading principle, asserted at common law, is, that the admiralty hath no jurisdiction, though the thing be done or happen at sea, if the original of the act was upon land. Hence, it is held, if a contract be made at land for any maritime business or thing, to be performed upon or beyond the seas, and there be a breach upon or beyond the seas, the cognizance belongs exclusively to the common law. This, it is said, is a necessary result from legal principles, for the contract and breach are both requisite to maintain an action, and as both are not "done or made upon the sea," the admiralty cannot claim any jurisdiction. It would be a waste of time to go over the different cases in the books, in which, upon this ground, prohibitions have been granted on account of suits in the admiralty on charter parties, affreightments, and other maritime contracts.—With a few exceptions they are ranged on one side, and in general state the decision without condescending to illustrate it by any reasons or argument.⁵⁵

This doctrine affects to be founded upon a strict construction of the statutes of *Richard II.*, because the con-

⁵⁵ 4 *Inst.* 134, 138, 139.—*Anon. Moore*, 450.—*Bylota vs. Pointel*, 159. *S. C.* *Bend. & Dal.* 69.—*Johnson vs. Drake*, 1 *Keble*, 176.—*Merryweather vs. Mountford*, 3 *Keble*, 552.—*Fleminge vs. Yate*, 1 *Roll. R.* 415.—*S. C.* 3 *Bulst.* 205.—*Cappe's case*, 2 *Roll. R.* 495, 497.—*Slaney vs. Cotton*, 2 *Roll. R.* 438.—*Cradock's case*, 2 *Brownl.* 37.—*Leigh vs. Burley, Owen*, 122.—*Spanish Amb. vs. Jolliff*. *Hob.* 78.—*Hankeridge's case*, 12 *Co.* 129.—*Hore vs. Clement*, 2 *Show.* 338.—*Burton vs. Fitzgerald*, 2 *Str.* 1078.—*Justin vs. Ballam*, 1 *Salk.* 34.—6 *Vin. Abrid.* 528, pl. 15, 16.

tract "arises" on land. It is curious to observe the inconsistencies of the common law courts on this subject. In the first place, the admiralty has no jurisdiction of contracts made *at sea* to be executed upon land, because though the contracts arise at sea, yet the performance, which is the principal thing, is to be on land. In the second place, the admiralty has no jurisdiction of contracts made on land to be executed at sea, because the contracts arise on land, and the performance at sea, though a principal thing, ought not to oust the common law, whose jurisdiction attached upon the contracts. Upon what principle is it, that the common law assumes jurisdiction in the one case or the other? Where the breach or the performance of the contract is upon or beyond the seas, no foreign venue can be laid, and no jury can come to try the issue joined upon such fact. And for this reason, as we have seen, the courts of common law formerly declined jurisdiction of such causes, because done without the realm. Besides, whatever may be the place of the contract, the action, plea, or *querelle* "arises" from the subsequent facts done upon the seas, a *fine omnis oritur actio*; and of the action, plea, or *querelle*, the admiralty ought, at all events, to have cognizance. The proper jurisdiction of the courts of common law is of things done within the bodies of counties, and its farther enlargement, by means of fictions, can be considered only as ingenious subterfuges and devices, to amplify their powers. The only ground of principle, upon which these courts can stand on this point, must be, that the cognizance of any one matter of fact within the county draws after it the cognizance of all others, as incidents to the exercise of this right;⁵⁶ and in this view, that it is perfectly immaterial, whether the jurisdiction vest by the making, the performance, or the breach, of the contract within the county; or that personal

⁵⁶ *Tremoulin vs. Sands*, Comb. 462.—4 Inst. 142.—Co. Litt. 261.

contracts, pleas and actions, have no locality, and "arise," and may, (as the civilians hold) be enforced, wherever the party or his property is found. In either view, the same reasoning must apply equally to the admiralty and entitle it to all the jurisdiction, which it has ever claimed as of right.⁵⁷ And in respect to mariners' wages, Lord Mansfield⁵⁸ evidently adopts the former construction, as indeed it had been held before.⁵⁹ He says, "There [i. e. in cases of wages] the contract is only a memorandum fixing the rate, and ascertaining the wages, *but the service at sea is the principal matter in consideration.* The gist and foundation of the action [in the admiralty] is the marine service."⁶⁰

And why, in the case of a charter party, bill of lading, or other maritime contract, is the doctrine less true? The service or other act is at sea, and the gist or foundation of the action is the marine transportation or other service, neglect or injury, and the contract is but collateral to the action. This principle was forcibly pressed by Noy in the interesting case of *Tucker vs. Cappe*,⁶¹ and was in part adopted by the court. It was in effect held by Mallett, J. in *Woodward vs. Bonithan*,⁶² and was solemnly supported and adjudged in *Coke vs. Cretchet*.⁶³

Much, indeed, that might be properly urged on this head, has been anticipated in another place. It has been already shewn; 1. that in reason and law a contract may be said to "arise," as well where it is executed, as where it is made; 2. that contracts made at land, to be executed

⁵⁷ Zouch, 104.⁵⁸ *Home vs. Napier*, 4 Burr. 1944.⁵⁹ *Coke vs. Cretchet*, 3 Lev. 60.⁶⁰ See 3 Bl. Com. 106.—*Abbott on Shipping*, part 4, ch. 4, s. 1.⁶¹ 2 Roll. R. 497.⁶² T. Raym. 3.⁶³ 3 Lev. 60.—See 2 Brown. Adm. 86.

at sea, were originally within the admiralty jurisdiction; 3. that contracts, pleas and quereles, whereof part of the facts arise on land, and part at sea, may well support a *concurrent jurisdiction* of the common law and the admiralty, since, in respect to each, a principal matter arises within its cognizance; and 4. that this construction is consistent with the words of the statutes of *Richard II.*, and avoids all the incongruities of the decisions of the common law.

These doctrines are yet farther supported by authority. By the stat. of 32 *H. VIII.*, ch. 14, cognizance was expressly given to the admiralty over charter parties and af-freightments within the purview of that act.⁶⁴ In the agreement of the judges in 1575, and again in that of the twelve judges in 1632, the admiralty jurisdiction in these cases is admitted in the most ample and explicit manner.⁶⁵ To the former agreement Lord *Coke* has made some objections, which are not probably well founded;⁶⁶ but to the latter no objections can apply, unless we are to deem the opinions of a single judge, or a single court, of more weight than the

⁶⁴ *Zouch*, 106, *Prynne's Animad.* 121, 122.

⁶⁵ The clause in the agreement of 1575 has been already quoted. In that of 1632 are the following:—"If suit be before the admiral for freight or mariners' wages, or for the breach of charter parties for voyages to be made beyond the seas, *though the charter parties happen to be made within the realm*; and though the money be payable within the realm, so as the penalty be not demanded; a prohibition is not to be granted. But if suits be for the penalty, or if the question be made whether the charter party be made or not, or whether the plaintiff did release or otherwise discharge the same within the realm, that is to be tried in the king's court at *Westminster*, and not in the king's court of admiralty, so that first it be denied upon oath, that the charter party was made, or a denial upon oath tendered."—"If suit shall be in the court of admiralty for building, amending, saving, or necessary victualling, of a ship, against the ship itself and not against any party by name, but such as for his interest makes himself a party, no prohibition shall be granted, though this be done within the realm." If it were pertinent we could here explain the restrictions in these clauses, but it would occupy too much time.

⁶⁶ 4 *Inst.* 135.

opinions of the twelve judges," delivered after solemn debate and deliberation before the king's council, upon this very contest as to jurisdiction, and designed to deliver the subject from the endless controversies, to which it seemed doomed by the shifting adjudications of the rival courts.⁶⁷ The ordinance too of parliament, made during the commonwealth, (in 1648) completely confirms this jurisdiction in its full extent.⁶⁸

Nor do these authorities stand alone. They are corroborated by the early practice of the admiralty, imme-

⁶⁷ They are at least of as great weight, as the resolutions of the judges on a like occasion in the *Articuli Cleri* (3 Jac.) which, though not enacted in parliament, nor adjudged in any cause pending in court, Lord Coke himself declares, "being resolved unanimously by all the judges of England and barons of the exchequer, are for matters of law of the highest authority, next unto the court of parliament." 2 *Inst.* 618.—Sir Leoline Jenkins has remarked, that the agreement of the judges in 1632, "was punctually observed as to the granting and denying of prohibitions, till the late disorderly times (meaning the times of the usurpation) bore it down, as an act of prerogative, prejudicial (as was pretended) to the common laws and the liberty of the subject." And the same articles were, in substance, re-enacted in the ordinance of parliament, in 1648, given in the next note. Sir L. Jenkins's *Works, Argumt. &c.* p. 81.

⁶⁸ See 2 *Bro. Adm.* 77.

⁶⁹ This ordinance is given at large from *Scobell's* collection (147) in Mr. Hall's valuable translation of *Clerke's Praxis* (xxiv.). The first section, after reciting the public inconveniences to trade through "the uncertainty of the jurisdiction in maritime cases," enacts "that the court of admiralty shall have cognizance and jurisdiction against the ship or vessel with the tackle, apparel, and furniture thereof, in all causes which concern the repairing, victualling, and furnishing provisions, for the setting of such ships or vessels to sea; and in all cases of bottomry, and likewise in contracts made beyond the seas concerning shipping or navigation, or damages happening thereon, or arising at sea in any voyage; and likewise in all cases of charter parties, or contracts for freight, bills of lading, or mariners' wages, or damages in goods laden on board ships, or other damages done by one ship or vessel to another, or by anchors or want of laying of buoys; except always that the said court of admiralty shall not hold pleas or admit actions upon any bills of exchange, or accounts betwixt merchant and merchant or their factors." This ordinance was made perpetual by another in 1663, but it fell with the other acts of the commonwealth upon the restoration of Charles II.

diately after the passage of the statutes of *Richard*; by the recognition of that practice in the courts of chancery and common law, in granting commissions of appeal and writs of *procedendo* and consultation in the respective reigns of *Richard II.*, *Henry IV.*, *Henry VIII.*, *Elizabeth*, *James I.* and *Charles I.*; ⁷⁰ by subsequent common law decisions scattered in the reports; ⁷¹ and lastly, by the uniform language of the commissions of the lord high admiral, granted since the statutes of *Richard II.*, which confer the most ample jurisdiction over all maritime contracts. ⁷²

There is also an exception to the doctrine, which we have been considering, (*vis.* that the admiralty hath no jurisdiction, where the contract is made at land, although to be executed at sea) which is wholly irreconcilable with the construction attempted to be given by the common lawyers to the statutes of *Richard II.*, and with every general prin-

⁷⁰ *Exton*, ch. 7, 8, 9, page 338 to 394.—*Spanish Amb. vs. Plage*, *Moore*, 814.

⁷¹ *Tasker vs. Gale*, 6 *Vin. Abr.* 527, pl. 19, 21; and see *Godfrey's case*, *Latch* 11.—*Smith vs. Tilley*, 1 *Kemble*, 712.

⁷² *Zouch* (92) has given a copy of the important clauses of one of those commissions. It authorizes the admiralty "to hold consuance of pleas, debts, bills of exchange, *policies of assurance*, accounts, charter parties, contractions, bills of lading, and all other contracts which may any ways concern moneys due for freight of ships hired and let to hire, moneys lent to be paid beyond the seas at the hazard of the lender, and also of any cause, business or injury whatsoever had or done in or upon or through the seas, or public rivers or fresh waters, streams, havens, and places subject to overflowing whatsoever within the flowing and ebbing of the sea, upon the shores or banks whatsoever adjoining to them or either of them from any of the said first bridges whatsoever towards the sea throughout our kingdoms of *England* and *Ireland*, in our dominions aforesaid, or elsewhere beyond the seas, or in any ports beyond the seas whatsoever." And see *Collection of sea laws*, ch. 2, *Malyne, Lex. Merc.* p. 47. The clause in this commission, as to jurisdiction on the shores, would seem to refer to the meaning of the word "*maritime*," as stated in *Hankridge's case*, 12 Co. 129, where it is said that "*maritima est super littus, or in portu maris*." Even Lord Hale felt himself bound to admit the antiquity of these claims of the admiralty, while he endeavoured to evade the force of the argument. *Justice vs. Brown*, *Hard.* 473.

ciple, for which they contend. I allude to the acknowledged right of the admiralty to entertain suits for mariners' wages. The history of this exception is highly instructive; and cannot be studied with too much attention by those, who are in search of the true exposition of the statutes of *Richard II.*; and the rightful jurisdiction of the admiralty.

It was at first held, that the admiralty had no jurisdiction over mariners' wages, because the contract was made on land.⁷² And the earliest case in the reports, in which the jurisdiction was affirmed, is in the 19th year of *James I.*⁷⁴ A prohibition was there prayed for and denied, "because he did not sue his prohibition in due time, viz. before a judgment given in the admiralty court, which in point of discretion they disallowed; and also these are poor mariners, and may not be delayed of their wages so long, and, besides, they may all join in a libel in the admiral's court, but, if they sue here, they must bring their actions several, and therefore it is good discretion in the court to deny the prohibition." This decision, founded upon compassion and laches, does not seem to have been readily acquiesced in, for in *Woodward vs. Bonithan*,⁷⁵ the court held, that mariners' wages were not sueable in the admiralty. Soon after this the courts sustained the jurisdiction in various cases, although constantly contested;⁷⁶ and from that period, this sufferance, as *Keeling, C. J.*⁷⁷ calls it, became general, and gradually ripened into a right, which has ever since, in cases of ordinary hire, remained undisputed.

⁷² *Dyer*, 159, note 38.

⁷⁴ *Anon. Winch.* 8.

⁷⁵ *T. Ray.* 3.

⁷⁶ *Anon.* 1 *Vent.* 146, 343. *Alleson vs. Marsh*, 2 *Vent.* 181.—*The King vs. Pike*, 2 *Kemble*, 779.

⁷⁷ *Smith vs. Tilley*, 1 *Kemble*, 712.

The grounds, upon which this exception has been supported, remain to be considered ; and the different reasons, which have been assigned by different judges, may be arranged under the following heads:—1. That it is more convenient for seamen to sue in the admiralty, because they may all join in one suit.⁷⁸ 2. That by the maritime law, if the ship perish by the mariners' default, they are to lose their wages ; which (it should seem from this reason) would be otherwise due at common law.⁷⁹ 3. That the true reason is, that though the contract be made on land, yet the ship is made liable for the wages.⁸⁰ 4. That mariners' wages grow due to them for labour or service done at sea, and the charter and contract at land is only to ascertain their rate.⁸¹ 5. That it is not on account of the service done at sea, but because *they are mariners*, and the suit is for *mariners'* wages ; and therefore, if the service be done in port, and the voyage be abandoned, the mariners may still sue for their wages in the admiralty.⁸² 6. That the jurisdiction of the admiralty over mariners' wages is an *ancient concurrent* jurisdiction, as ancient as the constitution itself.⁸³ 7. That it is expressly against the statutes of Rich. II. ; and is a mere indulgence, and is now grounded

⁷⁸ *Anon.* 1 *Vent.* 146.—*Wells vs. Osmond*, 6 *Mod.* 235.—*S. C.* 2 *L. Raym.* 1044.—*Clay vs. Sudgrave*, 1 *Salk.* 33.—*S. C.* 1 *L. Ray.* 576.—12 *Mod.* 405.—*Howe vs. Napier*, 4 *Burr.* 1944.—*Ross vs. Walker*, 2 *Wils.* 264.—*Anon.* 8 *Mod.* 379.—*Mills vs. Gregory, Sayer*, 127.

⁷⁹ *Anon.* 1 *Vent.* 146.

⁸⁰ *Wells vs. Osmond*, 6 *Mod.* 238.—*S. C.* 11 *Mod.* 31.—*S. C.* 2 *Ld. Ray.* 1044.—*Clay vs. Sudgrave*, 1 *Salk.* 33.—*Moreton vs. Hook*, 1 *Ld. Raym.* 397.—*Ross vs. Walker*, 2 *Wils.* 264.

⁸¹ *Coke vs. Cretchet*, 3 *Lev.* 60.—*Howe vs. Napier*, 4 *Burr.* 1944.

⁸² *Wells vs. Osmond*, 6 *Mod.* 238.—*S. C.* 11, *Mod.* 31.—*S. C.* 2 *Ld. Raym.* 1044.—*S. P. Anon.* 1 *Vent.* 343.—*Mills vs. Gregory, Sayer, R.* 127.

⁸³ *Brown vs. Benn*, 2 *Ld. Ray.* 1247.—*S. P. The Queen vs. London*, 6 *Mod.* 206.

De Lovio vs. Boit.

upon the maxim *quod communis error facit jus*;⁶⁴ and nothing but constant practice affirms it;⁶⁵ and it is not *de jure*, but by indulgence.⁶⁶

A short review of these reasons may not be without use. As to the first, it cannot of itself furnish any solid ground for vesting a jurisdiction otherwise unauthorized. It is an argument merely *ab inconvenienti*; and, besides, the jurisdiction exists equally, whether one or many mariners sue.⁶⁷ The second is founded upon a supposition, that the common law would, in the given case, decide differently from the maritime law, which is not true. The third is not universally true, or rather does not universally apply, for a suit may be maintained for mariners' wages in the admiralty, as well in *personam*, as in *rem*. It is an entire mistake, that its jurisdiction is in general limited to proceedings in *rem*.⁶⁸ The fourth is in direct hostility to the construction of the common law, as to all other maritime contracts, and if correct, furnishes a complete recognition of the general doctrine of the admiralty.⁶⁹ The fifth is a virtual contradiction of the fourth, and puts the jurisdiction upon the personal privilege of the parties, not upon the nature or the place of the service done, a distinction at war with the statutes of *Richard*, and not easily reconcilable with the case of *Rose vs. Walker*.⁷⁰ The sixth

⁶⁴ *Clay vs. Snelgrave*, 1 *Ld. Raym.* 576—*S. C.* 1 *Salk.* 33—12 *Mod.* 406.

⁶⁵ *Opy vs. Addison*, 12 *Mod.* 38—*S. C.* 1 *Salk.* 31—*Day vs. Searl, Cunning. R.* 32—*S. C.* 7 *Mod.* 206.

⁶⁶ *Ever vs. Jones*, 2 *Ld. Ray.* 934.—*Day vs. Searl, Cunning. R.* 32.—7 *Mod.* 206—*Ridg. R.* 53—2 *Barnard.* 419.

⁶⁷ *Allason vs. Marsh*, 2 *Vent.* 181.—*Hook vs. Moreton*, 1 *Ld. Ray.* 397.

⁶⁸ *Allason vs. Marsh*, 2 *Vent.* 181.

⁶⁹ See *Abbott on Shipping*, P. 4, ch. 4, s. 1.

⁷⁰ 2 *Wils.* 264.

reason is undoubtedly well founded, and is a complete answer to the laborious commentaries of Lord *Coke*. But the reason is in itself of no weight, unless it is admitted, that the statutes of *Richard II.* were not intended to abridge any part of the original rightful jurisdiction of the admiralty, but only to check its usurpations over contracts made at land unconnected with maritime business. In this view it has a most important bearing. The seventh and last reason is indeed extraordinary. It may be truly observed, in the pointed language of Mr. *Douglas*,²¹ "surely it is not consonant to legal principle to hold, that any usage or common error can abrogate a statute to any purpose, or give legality to what an act of parliament expressly prohibits."

It may be added, that all these reasons, except the fourth and sixth, have not the slightest connexion with any possible construction of the statutes of *Richard II.*; and the fourth and sixth, if they are correct in principle, sustain the whole superstructure of the admiralty jurisdiction over all maritime contracts.

In respect also to mariners' contracts, certain distinctions seem to prevail at common law, which are as purely arbitrary and irreconcilable with sound principle, and the statutes of *Rich. II.*, as any, which have been mentioned. I allude to the distinctions, that although mariners may sue in the admiralty for their wages for services wholly rendered in port, or in navigating from port to port within the realm,²² and this, as well where the contract is in writing as by parol, provided it be upon the usual terms and stipulations;²³ yet the master of the ship is not allowed, under

²¹ *Wilkins vs. Carmichael*, Doug. R. 101—note 1.

²² *Wells vs. Osman*, 2 Ld. Ray. 1044—S. C. 6 Mod. 238.—*Mills vs. Gregory*, Sayer's Rep. 127.—*Anon.* 1 Vent. 343.—2 Bro. Adm. App. 533.

²³ *Bens vs. Parre*, 2 Ld. Ray. 1206.—*Anon.* 8 Mod. 379.

any circumstances, to sue there for his wages,⁶⁶ nor the mariners, if their contract be *under seal*,⁶⁷ or contain any unusual covenants or stipulations. The reason of the distinction as to the master is said to be, that the mariners are presumed to contract upon the credit of the ship, and the master upon the personal credit of the owner; a reason altogether gratuitous, for the credit is in fact as much given to the owner in the one case, as in the other. And Mr. Abbott justly observes, that "it is difficult to distinguish the case of the master from that of the persons under his command; the nature and place of the service, and the place of the hiring, are in both cases usually the same."⁶⁸ And there have been cases, even at the common law, where the distinction has been doubted and denied.⁶⁹

The next distinction, as to the contract's being under seal, is no where very fully explained. In *Bridgman's case*,⁷⁰ it is said to be, because an obligation takes its course and binds according to the common law, which would seem to be no reason at all. A more plausible reason is, that the civil law requires two witnesses to prove a sealed instrument,⁷¹ whereas the common law requires but

⁶⁶ *Ragg vs. King*, 2 Str. 858.—*Clay vs. Sudgrave*, 1 Salk. 33—S. C. 1 Ld. Ray. 576, 12 Mod. 405.—*Read vs. Chapman*, 2 Str. 937.—*The Favourite*, 2 Rob. 232.—*Bailey vs. Grant*, 1 Salk. 33—S. C. 1 Ld. Ray. 632.—12 Mod. 440.

⁶⁷ *Palmer vs. Pope*, Hob. 79, 212.—*Opy vs. Child*, 1 Salk. 31—S. C. 12 Mod. 38.—*Day vs. Searl*, 3 Str. 968—S. C. 7 Mod. 206.—*Cunning. R.* 32.—*Ridge*, 53.—*Howe vs. Napier*, 4 Burr. 1944.

⁶⁸ *Abbott, Ship. Part 4, ch. 4, s. 1.*

⁶⁹ See cases cited in *Clay vs. Sudgrave*, 1 Ld. Ray. 578.—12 Mod. 405.—*Rex vs. Pike*, 2 Keble, 779.—*Smith vs. Tilley*, 1 Keble, 712.—*Barber vs. Wharton*, 2 Ld. Ray. 1452.—16 Vin. Abr. 438, pl. 35.—2 Bro. Adm. 89, 95, 104.

⁷⁰ Hob. 11.

⁷¹ The civil law never requires two witnesses, nor indeed any witness, unless the execution of the deed is denied by the party on

one.¹⁰⁰ Assuming this statement to be correct, as to the admiralty practice, it ought not to oust the jurisdiction, but to induce the courts of common law, by proper process, to compel a conformity with their own rules.¹ Besides, the libel is for the service at sea, and the sealed contract comes in collaterally, or in the defence; and if the admiralty have jurisdiction over the subject matter, it has also jurisdiction of all the incidents; and, in such case, though a question arise proper for the common law, yet we are told the admiralty may try it.² Another reason has been adduced, *viz.* that the admiralty is not a court of record, and therefore, like the county court; it cannot hold plea of a specialty.³ It is not to our present purpose to inquire, how far this is true as to the county court; and if true, what is the foundation of the exception; but in respect to the admiralty, notwithstanding the very positive assertions of Lord Coke, it is by no means admitted, that it is not a court of record. The common law definition of a court of record is, a court that hath authority to fine and imprison.⁴ And accordingly, in *Empringham's* case,⁵ it was held, that the admiralty had no power to fine and imprison, because it was not a court of record, and its proceedings were according to the course of the

oath, which very rarely can happen. In this respect it holds the chancery rule, that if any fact be denied in the defendant's answer on oath, his denial shall prevail, unless disproved by two witnesses, or one witness, and very strong corroborative circumstances.

¹⁰⁰ See *Hove vs. Napier*, 4 Burr. 1944.—*Menetone vs. Gibbons*, 3 T. R. 367.—*Smart vs. Wolff*, 3 T. R. 323, and *Buller, J. id.* 348.

¹ *Richardson vs. Disborow*, 1 Vent. 291.—2 Pothier Obl. 273, &c. transl. by Evans.

Tremoulin vs. Sands, Comb. 462.—S. C. 12 Mod. 144.—*Menetone vs. Gibbons*, 3 T. R. 267.

² *Menetone vs. Gibbons*, 3 T. R. 268, 4 Inst. 135.

⁴ Salk. 800, 12 Mod. 388.—1 Ld. Ray. 213.—3 Bl. Com. 24.—Bac. Abr. Courts, D. 2, p. 101.

⁵ 12 Co. 84.

civil law.⁶ The same doctrine had been previously held in *Thomlinson's case*,⁷ and in an anonymous case;⁸ and yet it was said in the last case, that by custom the admiralty might amerce the defendant for his default at its discretion.⁹ But surely this doctrine cannot be true; for it is perfectly clear, that the admiralty, from the highest antiquity, has exercised a very extensive criminal jurisdiction, and punished offences by fine and imprisonment. The celebrated inquisition at *Queensborough*, in the reign of *Edward III.*, would alone be decisive.¹⁰ And even at common law it has been adjudged, that the admiralty might fine for a contempt.¹¹ As to the other reason for its not being a court of record, viz. that it proceeds according to the course of the civil law, and that an appeal, and not a writ of error, lies from its decrees; they have nothing to do with the question, for whether a court of record or not does not depend upon the form of proceeding in any court. Besides, the admiralty is expressly recognised as a court of record in King *Edward's* ordinance at *Grimsby*, where it is said, "la cause estoit pour ce que l'admiral et ses lieutenants sont de record,"¹² and, in the articles in the black book of the admiralty, it is articulately declared, "quod admirallus et locum tenentes sui sunt de recordo."¹³ But even admitting, that the admiralty were not a court of record, it would not shew that it had no jurisdiction over sealed contracts; for the chancery is not a court of record, and yet it may clearly entertain suits on them.¹⁴ And, to apply

⁶ 4 Inst. 135.⁷ 12 Co. 104.⁸ 13 Co. 52.⁹ 19 H. 6, 7, Bro. Abr. Admiraltie, 1.¹⁰ See also Com. Dig. Adm. D, 1 and 2. E. 12 and 13.¹¹ Anon. Styles, 171.—*Sparks vs. Martyn*, 1 Vent. 1.—Cl. Prax, tit. 67.—2 Bro. Adm. 110.¹² Eston, 27.¹³ Clerks, Prax. 146.—*Rough. Art.* 39.¹⁴ In the *United States'* courts, there could be no ground for this argument, since all those courts are courts of record.

a strong remark of Lord Kenyon,¹⁵ if the admiralty has jurisdiction over the subject matter, to say that it is necessary for the parties to go upon the sea to execute the instrument, (and, as I would add, to make an unsealed contract) borders upon absurdity. Nor are the authorities uniform on this point. In *Coke vs. Cretchet*,¹⁶ *Clay vs. Sudgrave*,¹⁷ *Brick vs. Atwood*,¹⁸ and *Gawn vs. Grandree*,¹⁹ it was in effect held, that there was no difference between the contract's being by deed or by parol.

The other distinction, as to the contract containing unusual covenants and stipulations, is quite as unsatisfactory. It is said in its support, that if the contract for service be made upon terms and conditions differing from the general rules of law, the service alone cannot entitle a mariner to his wages; his right then must depend upon the performance of the stipulated terms; and the construction of the instrument containing those terms is a proper subject for the jurisdiction of the courts of common law.²⁰ The construction of a written instrument is a proper subject for every court having cognizance of the subject matter; and this rule is equally as applicable to the admiralty, as to any other court. The admiralty certainly has cognizance of written contracts in many cases, as of bottomry, and ransoms; and it was never yet heard of, that it had no right to put an interpretation upon these instruments. Even in relation to written contracts for mariners' wages, its jurisdiction is not contested; and if wages are to be decreed, or denied, it is impossible for the court to do either, with justice, unless it looks into and construes the contract. And it

¹⁵ *Menetone vs. Gibbons*, 3 T. R. 267.

¹⁶ 3 Lev. 60.

¹⁷ 12 Mod. 406.

¹⁸ 2 Str. 761.

¹⁹ *Holt's Rep.* 45, 50, pl. 6.

²⁰ *Abbott, Shipp. Part 4, ch. 4, s. 3.*

would be worse than idleness to contend, that the rules of construction are different in sealed and unsealed instruments. The other ground is more specious, but not more solid. It is not true, in any case, that the wages are due merely because the service is performed. It must be performed according to the express stipulations of the parties, even in the usual form of the contract, or according to the implied stipulations resulting from the maritime law, where that is silent, otherwise the wages will not grow due. And there is no more reason, why courts of common law should have the exclusive construction of written agreements of an unusual sort, than of those upon the ordinary terms. Do these courts vainly imagine, that the admiralty cannot construe maritime contracts with as much equity, sound principle, and good sense, as themselves? It is some pleasure to find, that the soundness of this distinction has, at least in one case, been denied.²¹

All these distinctions are entirely aside from any construction of the statutes of *Richard*; and if they are to be held as law, they are limitations of judicial discretion in granting "indulgences," which seem nearly allied to the maxim, *sic volo, sic jubeo, stet pro ratione voluntas*.²²

It has been farther asserted, that the admiralty has jurisdiction, only when the parties have bound themselves *in rem*; for, if they have bound themselves *personally*, its jurisdiction is said to be ousted.²³ This doctrine is not pretended to be founded upon the statutes of *Richard*. Yet it is difficult to perceive, how it can be otherwise supported; and no adjudged case rests singly upon it. Indeed, in

²¹ *Benne vs. Parre*, 2 Ld. Raym. 1296.

²² See 2 *Brow. Adm.* 94, 96, 104.

²³ Per Buller, J. in *Menstone vs. Gibbons*, 3 T. R. 267, 270, and see *Ousten vs. Hibden*, 1 Wils. 100.

the very case, in which it was alluded to, (*viz.* a maritime hypothecation) the usual form of the instrument includes a personal obligation or covenant. All the forms, which have fallen under my notice, are of this nature, and the customary instrument, a bond, necessarily includes a personal liability.²⁴ Yet it is conceded on all sides, that of maritime hypothecations the admiralty has jurisdiction.—The case of mariners' wages also involves a personal contract, and nothing is more common, than a libel against the master or owner *in personam*. In respect also to personal torts on the high seas, such as assaults and batteries, the process is necessarily *in personam*; ²⁵ and the same process is familiarly applied in matters of prize.²⁶ So far indeed is it from being true, that the admiralty has no right to proceed except *in rem*, that in former times, and down to the reign of James I., its proceedings were almost altogether *in personam*, as they must still be, when the process *in rem* becomes inapplicable or inefficient.²⁷ The dictum, which we are now considering, seems indeed to have no better or higher origin, than that of a mere inference from the position, that where the common law has jurisdiction, the admiralty is excluded.

We have now finished our review of the doctrines, which the courts of common law have held in the interpretation of the statutes of Richard II. It has been shewn, that the decisions are not reconcilable with each other, or with the

²⁴ See the forms in *Abbott on Shipp. Appx. No. 1, 2, 3.*—*Glover vs. Black. 3 Burr. 1394.*—*Marshal on Insur. b. 2, ch. 1, p. 733, &c.* and *Appx. No. V.*—1 *Magens on Ins. 25.*—*Molloy de Jur. Mar. book 2, ch. 11, s. 12.*—2 *Magens, 393.*—3 *Rob. 31.*

²⁵ 2 *Bro. Adm. 110, 106, 396, 397.*

²⁶ *Smart vs. Wolff, 3 T. R. 323.*

²⁷ See *Sparks vs. Stafford, Hard. 176.*—*Clerke, Præx. passim.*—2 *Bro. Adm. 396, 397.*

words of the statute, or with any sound and uniform principle of construction. There seems indeed some foundation for the declaration of Lord *Holt*,²⁰ that "heretofore the common law was too severe against the admiralty;" and for the severe censure of the learned Dr. *Browne*, that these decisions were founded "more in prejudice than in reason;"²¹ that they were "not founded in any system, nor fraught with any consistency"; and that they have "involved the subject in endless perplexity."²²

In addition to the considerations, which have already been submitted, against the common law interpretation of these statutes, there are no small difficulties, which still remain behind. Whole classes of cases are yet within the acknowledged cognizance of the admiralty, which are at war with that interpretation, and can be sustained only upon the more liberal and consistent doctrines of the admiralty. I have already stated the cases of the execution of foreign sentences, and of foreign maritime hypothecations. These are not alone. Until a comparatively modern period; notwithstanding the statutes, the admiralty exercised undisturbed jurisdiction over petitory or proprietary suits;²³ and it still continues, with the approbation of the common law, to entertain suits, 1. For possession of ships. 2. Upon controversies among part owners as to the employment of ships, and 3dly, Stipulations made on land in causes pending in the court. This last class may properly be deemed a mere incident to the cognizance of the principal cause; yet the common lawyers resisted it, as an infringement of the statutes, and it was not finally established in favour of

²⁰ *Hoop vs. Moreton*, 1 *Ld. Raym.* 397.

²¹ 2 *Bro. Adm.* 85.

²² 2 *Bro. Adm.* 100.

²³ *The Aurora*, 3 *Rob.* 136.—2 *Bro. Adm.* 114, &c.—*Clerk. Prax. tit.* 42.

the admiralty, until after a struggle for a century.³² But, as to the four remaining classes, the admiralty has had jurisdiction from the highest antiquity; and yet these are not "things done upon the sea." It is therefore a necessary inference, either that the common law interpretation is too narrow, and ought to be rejected; or that these authorities, still allowed to be exercised, are gross usurpations. That the latter construction is correct will not be affirmed by any person, who has examined the subject with due diligence and candour. That the former is dictated by general reasoning, public convenience, and great weight of authority, will scarcely be denied. Nay even the prize jurisdiction imperiously demands a similar doctrine, at least so far as it is exercised over prizes captured in rivers, creeks or ports, accessible to the sea; and on land by naval forces.³³ For whether, (as seems the better opinion³⁴) the prize jurisdiction be an immemorial and inherent attribute of the admiralty, or depend upon the commissions issued from time to time during wars, the words of the statutes of *Richard* as much apply to the prize as to the instance court. And if the prize commission be evidence, that, notwithstanding the statutes, the court may take cognizance of captures in creeks and ports, the ordinary commission of the admiralty is just as good evidence of the extent of its ordinary jurisdiction in the same places.³⁵ It would seem

³² 4 *Inst.* 135.—*Zouch*, 125.—*Per vs. Evans*, *T. Ray.* 78.—*De grave vs. Hedges*, 2 *Ld. Raym.* 1285.—*Justice vs. Brown*, *Hard.* 473.

³³ *Lindo vs. Rodney*, *Doug.* 613.—See *Hubbard vs. Pearse*, cited in *Le Caux vs. Eden*, *Doug.* 594, 606.

³⁴ *Rob. Coll. Marit.* Preface vii.

³⁵ In recent statutes, the prize jurisdiction is expressly given in ports and creeks; but the same jurisdiction was exercised by the admiralty before any statutes were made to this effect, as a part of its original powers.—See *Nabob of the Carnatic vs. East India Company*, 1 *Ves. jr.* 371, 391.

to be a mistake of Lord *Mansfield* ³⁶ that the courts of common law never considered prize causes within the statutes, and that no complaint ever was made respecting them. There are various cases in the books, which intimate a contrary doctrine, ³⁷ if the very elaborate judgment of his lordship, to prove the exclusive jurisdiction in matters of prize, were not of itself a strong proof, that nothing was before that time well settled on the subject. Indeed an examination of the various doctrines, found in our common law reports, would not only confirm this statement, but would exhibit many strange and curious deviations from what would at the present day be deemed common place learning in matters of prize. And it is very doubtful, whether, until a recent period, any such distinction, as a prize and instance side of the court, was known among the common lawyers. After some research, I have not been able to detect the slightest allusion to it in any report before the case of *Lindo vs. Rodney*.³⁸

Considerations and consequences, like those, which have been mentioned, cannot but forcibly impress every one, who has examined this subject with accuracy and diligence, and lead to the conclusion (adopted by Dr. *Brown*) that the jurisdiction of the admiralty depends, or ought to depend, as to contracts, upon the subject matter, i. e. whether maritime or not; and as to torts, upon locality, i. e. whether done upon the high sea, or in ports within the ebb and flow of the tide, or not.³⁹ Such is the limit of its jurisdiction, which the admiralty has strenuously asserted at all times, notwithstanding a torrent of prohibitions has com

³⁶ *Lindo vs. Rodney*, Doug. 613. Note 1.

³⁷ *Willet vs. Newport*, 1 Roll. R. 250.—*Weston's Case*, 2 Brownl. 11.—*Thermolin vs. Sands*, Carth. R. 423.—*Anon. March*. 110.—*Anon. 12 Mod.* 16.—*Sherman vs. Sands*, 1 Ld. Ray. 271.—*Anon. 1 Vent.* 308.

³⁸ Doug. 613, n.

³⁹ 2 Bro. Adm. 88, 90, 110.

pelled it to yield its rights to superiour authority. Even in our own times, it has vindicated some of its ancient claims; ⁴⁰ and Dr. *Brown* has pointedly observed, "if a party should institute a suit in that court on a charter party, for freight, in a cause of average and contribution, or to decide the property of a ship, and be not prohibited, I do not see how the court could refuse to entertain them; and *"I have some reason to think, that this my opinion is supported by very high authority."* Sir *Leoline Jenkins* has also ably pointed out the inconveniencies to the public and to trade, if the admiralty jurisdiction be evaded in four of the great branches of maritime contracts. 1. As to foreign contracts, or those made abroad. 2. As to mariners' wages, freight and charter parties. 3. As to building and victualling ships, and as to material men, i. e. those, who furnish materials or supply work for ships. And 4. As to disputes between part owners.⁴¹ Nor should it be forgotten, that in the agreement of the twelve judges in 1632, these claims of the admiralty were most amply admitted and confirmed.⁴²

On the whole, the result of this examination may be summed up in the following propositions. 1. That the ju-

⁴⁰ *Velthuson vs. Ormsby*, 3 T. R. 315.—*Smart vs. Wolff*, 3 T. R. 323.—*Menetone vs. Gibbons*, 3 T. R. 267.—*Ladbroke vs. Crickett*, 2 T. R. 649.

⁴¹ 2 Bro. Adm. 77. Note (5.)

I have to regret, that I have not been able to consult the originals of two works quoted in this opinion, which would probably have materially aided my inquiries by their learning and ability. I allude to Sir *Leoline Jenkins*' works, and *Prynne's Animadversions* on the 4th Institute. These works were not to my knowledge in *New England* at the time of delivering this opinion; and I have been always obliged to cite them at second hand.

⁴² See *Wood's Inst.* 494.

It is apparent, that the late learned Mr. Justice *Winchester* adopted these claims in their full extent. I know not any man in the *United States*, who seems to have had more profound and accurate views of the admiralty jurisdiction, than this very able judge. 1 *Peters, Rep.* 233.

jurisdiction of the admiralty, until the statutes of *Richard 2*, extended to all maritime contracts, whether executed at home or abroad, and to all torts, injuries, and offences, on the high seas, and in ports and havens, as far as the ebb and flow of the tide. 2. That the common law interpretation of these statutes abridges this jurisdiction to things wholly and exclusively done upon the sea. 3. That this interpretation is indefensible upon principle, and the decisions founded upon it are inconsistent and contradictory. 4. That the interpretation of the same statutes by the admiralty does not abridge any of its ancient jurisdiction, but leaves to it cognizance of all maritime contracts, and all torts, injuries and offences, upon the high sea, and in ports as far as the tide ebbs and flows. 5. That this is the true limit, which upon principle would seem to belong to the admiralty; that it is consistent with the language and intent of the statutes; and is supported by analogous reasoning, and public convenience, and a very considerable weight of authority. 6. That under all the circumstances, the courts of law and of admiralty in *England* are not so tied down by a uniformity of decisions, that they are not at liberty to entertain the questions anew, and to settle the doctrines upon their true principles; and that this opinion is supported by some of the best elementary writers in that kingdom.

But whatever may in *England* be the binding authority of the common law decisions upon this subject, in the *United States* we are at liberty to re-examine the doctrines, and to construe the jurisdiction of the admiralty upon enlarged and liberal principles. The constitution has delegated to the judicial power of the *United States* cognizance "of all cases of admiralty and maritime jurisdiction;" and the act of Congress "has given to the District Court "cognizance of all civil causes of admiralty and mari-

⁴² 24 Sept. 1789, ch. 20, s. 9.

time jurisdiction, including all seizures under laws of impost, navigation or trade, of the United States, where the seizures are made on waters navigable from the sea by vessels of ten or more tons burthen; within their respective districts, as well as upon the high seas."

What is the true interpretation of the clause "all cases of admiralty and maritime jurisdiction"? If we examine the etymology, or received use, of the words "admiralty" and "maritime jurisdiction," we shall find, that they include jurisdiction of all things done upon and relating to the sea, or, in other words, all transactions and proceedings relative to commerce and navigation, and to damages or injuries upon the sea.⁴⁴ In all the great maritime nations of Europe, the terms "admiralty jurisdiction" are uniformly applied to the courts exercising jurisdiction over maritime contracts and concerns. We shall find the terms just as familiarly known among the jurists of *Scotland*, *France*, *Holland* and *Spain*, as of *England*, and applied to their own courts, possessing substantially the same jurisdiction, as the English admiralty in the reign of *Edward the third*.⁴⁵

⁴⁴ *Cowell, Interpreter, voce Admiral*.—*Spelman's Glossary, voce Admiral, sub finem*.—*Godolph. Jurisd. ch. 1.*—1 *Valin, Comm. 1.*—*Seld. de Dom. Mar. lib. 2, cap. 16, p. 160.*—*Stypman, Jus. Marit. par. 1, cap. 6, p. 76, 77, par. 5, cap. 1, p. 602.*—*Loccenius, Jus. Marit. lib. 2, cap. 2.*

⁴⁵ *Cleirac, Jurisd. de la Marine, p. 191, &c.*—*Valin, Comm. 1, 112, 120, 127, &c.*—*Zouch, 87, 91.*—*Eaton, 45, 46, 49.*—*Collection of Sea Laws in Malynes, Lex. Merc. 47.*—2 *Bro. Adm. 30.*

The coincidence between the general authorities delegated in the admiral's commission in *Scotland*, and still exercised there, and those in the commission of the admiral in *England*, is so striking as distinctly to shew a common origin. The admiralty in *Scotland* has cognizance of "all complaints, contracts, offences, pleas, exchanges, *assurances*, debts, counts, charter parties, covenants, and all other writings concerning lading and unlading of ships, freights, hires, money lent upon casualties and hazard at sea, and all other businesses whatsoever among sea farers done at sea, this side sea, or beyond sea; the cognition of writs of appeal from other judges, and the causes and actions of reprisal and letters of mark; and to take stipulations, cognoscions and insinuations in the books of the admiralty."—*Collect. Sea Laws, ch. 2, Malynes, 47.*—See also 1 *Black. Comm. 94, 95.*—*Post. Note p. 75.*

If we pass from the etymology and use of these terms (i. e. "admiralty jurisdiction") in foreign countries, the only expositions of them, that seem to present themselves, are, that they refer 1. to the jurisdiction of the admiralty as acknowledged in *England* at the American Revolution; or 2. at the emigration of our ancestors; or 3. as acknowledged and exercised in the *United States* at the American Revolution; or 4. to the ancient and original jurisdiction, inherent in the admiralty of *England* by virtue of its general organization.

As to the first exposition, it is difficult to perceive upon what ground it can be reasonably maintained, for it would enlarge and limit the jurisdiction by the provisions of statutes, which have been enacted for the government and regulation of the high court of admiralty, and which *proprio vigore* do not extend to the colonies. It would farther involve qualifications of the jurisdiction, which are perfectly arbitrary in themselves, inapplicable to our situation, and contradictory to the commissions and practice of the vice admiralty colonial courts. Even if this exposition were to be adopted, are we to be governed by the doctrines of the common law, or of the admiralty? I am not aware of any superiour sanctity in the decisions at common law upon the subject of the jurisdiction of other courts, (to which at least they bore no good will) which should entitle them to outweigh the very able and learned decisions of the great civilians of the admiralty. And where could we so properly search for information on this subject, as in the works of those jurists, who have adorned the maritime courts from age to age, and made its jurisdiction the pride and study of their lives?

The second exposition is liable to the same objections; for it is clear, that the statutes of *Richard* do not extend in terms to the colonies, and it is quite certain, that they were

not included in any supposed mischiefs, for they then had no existence. Besides, it is a very material consideration, that, at the emigration of our ancestors, the contest between the courts of common law and the admiralty was at its height; and very soon after (in 1632) it was, by the agreement of the twelve judges, decided in favour of the admiralty. And here again it may be asked, whose doctrines are to be adopted, those of the common law or of the admiralty?

The third exposition requires an examination of the authority and powers of the vice admiralty courts in the *United States* under the colonial government. In some of the states, and probably in all, the crown established, or reserved to itself the right to establish, admiralty courts; ⁶⁶ and the nature and the extent of their jurisdictions depended upon the commission of the crown, and upon acts of Parliament conferring additional authorities. The commissions of the crown gave the courts, which were established, a most ample jurisdiction over all maritime contracts, and over torts and injuries, as well in ports as upon the high seas.⁶⁷ And acts of parliament enlarged, or rather recog-

⁶⁶ In the charter of *Massachusetts*, in 1692, there is an express reservation of the exclusive right in the crown to establish admiralty courts, by virtue of commissions issued for this purpose. See also *Colon. Acts* 1688, 1672. *Mass. Col. and Prov. Laws*, edit. 1814, p. 716.

⁶⁷ It is presumed that the commissions were usually in the same form. One of the latest is to the governor of the royal province of *New Hampshire* in 6 Geo. 3. It authorizes him "to take cognizance of, and proceed in, all causes civil and maritime, and in complaints, contracts, offences or suspected offences, crimes, pleas, debts, exchanges, accounts, charter parties, agreements, suits, trespasses, enquiries, extortions, and demands, and business civil and maritime whatsoever, commenced or to be commenced between merchants, or between owners and proprietors of ships and other vessels, and merchants or others whomsoever with such owners and proprietors of ships and all other vessels whatsoever employed or used within the maritime jurisdiction of our vice admiralty of our said province, &c. or between any other persons whomsoever had, made, begun or contracted, for any matter, thing, cause or business whatsoever done, or to be done, within our maritime jurisdiction aforesaid, &c. &c.; and moreover in all and sin-

nised, this jurisdiction by giving or confirming cognizance of all seizures for contraventions of the revenue laws.* Tested therefore by this exposition, the admiralty jurisdiction of the *United States* would be as large, as its most strenuous advocates ever contended for.

The clause however of the constitution not only confers *admiralty* jurisdiction, but the word "maritime" is super-added, seemingly *ex industria*, to remove every latent doubt. "Cases of maritime jurisdiction" must include all maritime contracts, torts and injuries, which are in the understanding of the common law, as well as of the admiralty, "*causæ civiles et maritimæ*." In this view there is a peculiar propriety in the incorporation of the term "maritime" into the constitution. The disputes and discussions, respecting what the admiralty jurisdiction was, could not but be well known to the framers of that instrument.⁴⁰ One party sought to limit it by locality ; another by the subject matter. It was wise, therefore, to dissipate all question by giving cognizance of all "cases of maritime jurisdiction," or, what is precisely equivalent, of all maritime cases. Upon any other construction, the word "maritime" would be mere tautology ; but in this sense it has a peculiar and appropriate force. And Mr. Justice *Winchester* (speaking with reference to contracts) has very correctly observed, that "neither the judicial act nor the constitution, which it

gular complaints, contracts, agreements, causes and businesses, civil and maritime, to be performed beyond the sea or contracted there, however arising or happening," with many other general powers.— And it declares the jurisdiction to extend "throughout all and every the sea shores, public streams, ports, fresh waters, rivers, creeks and arms, as well of the sea, as of the rivers and coasts whatsoever of our said province," &c. *In point of fact* the vice admiralty court of *Massachusetts*, before the revolution, exercised a jurisdiction far more extensive, than that of the admiralty in England. See also the *Little Joe. Stewart's R.* 394.

⁴⁰ *The Fabius*, 2 Rob. 245.

* *Montgomery vs. Henry*, 1 Dall. 149. *Talbot vs.* ——— 1 Dall. 95.

follows, limit the admiralty jurisdiction of the District Court in any respect to place. It is bounded only by the *nature of the cause*, over which it is to decide."⁵⁰

The language of the constitution will therefore warrant the most liberal interpretation; and it may not be unfit to hold, that it had reference to that maritime jurisdiction, which commercial convenience, public policy, and national rights, have contributed to establish, with slight local differences, over all *Europe*; that jurisdiction, which, under the name of consular courts, first established itself upon the shores of the *Mediterranean*, and, from the general equity and simplicity of its proceedings, soon commended itself to all the maritime states; that jurisdiction in short, which collecting the wisdom of the civil law, and combining it with the customs and usages of the sea, produced the venerable *Consolato del Mare*, and still continues in its decisions to regulate the commerce, the intercourse, and the warfare of mankind.⁵¹ Of this great system of maritime law it may be truly said—"non erit alia lex Romæ, alia Athenis, alia nunc, alia posthac; sed et omnes gentes, et omni tempore, una lex, et sempiterna et immortalis, continebit."⁵²

At all events, there is no solid reason for construing the terms of the constitution in a narrow and limited sense, or for ingrafting upon them the restrictions of English statutes, or decisions at common law founded on those statutes, which were sometimes dictated by jealousy, and sometimes by misapprehension, which are often contradictory, and rarely supported by any consistent principle. The advantages resulting to the commerce and navigation of the *Unit-*

⁵⁰ *The Sandwich*, *Peters*, Rep. 233. Note.

⁵¹ *Zouch*, ch. 1, p. 87, &c.—*Selden ad Fletam*, cap. 8, s. 5.—*Rob. Collect. Marit.* 105. Note.—*Le Guidon*, ch. 3.—1 *Emer.* 21.

⁵² *Cic. Frag. de Repub. lib. 3.* (Editio. Bost. 1817. tom. 17, p. 186.

ed States, from a uniformity of rules and decisions in all maritime questions, authorize us to believe that national policy, as well as juridical logic, require the clause of the constitution to be so construed, as to embrace all maritime contracts, torts and injuries, or, in other words, to embrace all those causes, which originally and inherently belonged to the admiralty, before any statutable restriction. And most cordially do I subscribe to the opinion of the learned Mr. Justice *Winchester*, in the case already cited,³³ "that the statutes of *Richard 2* have received in *England* a construction, which must at all times prohibit their extension to this country," and "that no principles can be extracted from the adjudged cases in *England*, which will explain or support the admiralty jurisdiction, independent of the statutes or the works of jurists, who have written on the general subject." Indeed, the doctrine that would extend the statutes of *Richard* to the present judicial power of the *United States* seems little short of an absurdity. It is incorporating into the text of the constitution an exception, not only unauthorized by its terms, but wholly inappropriate in phraseology to any other realm than *England*. We have not as yet any "admirals or their deputies;" we do not refer their jurisdiction to the reign of "the most noble king *Edward* the third;" much less would an American citizen dream, that the constitution authorized the admiralty "to arrest ships in the great flotes for the great voyages of the king and of the realm;" and "to have jurisdiction upon the said flotes during the said voyages only," and "saving always to the king all manner of forfeitures and profits thereof coming," and "to the lords, cities and boroughs their liberties and franchises."

There are moreover decisions of the courts of the *United States*, which completely establish the proposition, that

³³ *The Sandwich*, *Peters's R.* 233. *Note.*

the statutes of *Richard*, and the common law construction of them do not attach to this clause of the constitution. We have already seen, that the courts of common law, after these statutes, held, that the admiralty had no jurisdiction of things done within the ebb and flow of the tide, in ports, creeks, and havens. It has, notwithstanding, been repeatedly and solemnly held by the Supreme Court, that all seizures under laws of impost, navigation and trade, on waters navigable from the sea by vessels of ten or more tons burthen, as well within ports and districts of the *United States*, as upon the high seas, are causes of admiralty and maritime jurisdiction.⁴⁴ This limitation, as to the place of seizure, is prescribed by an act of Congress;⁴⁵ but it is perfectly clear, that Congress have no authority to include cases within the admiralty jurisdiction, which the terms of the constitution did not warrant. And the ground is made stronger by the consideration, that the right of trial by jury is preserved by the constitution in all suits *at common law*, where the value in controversy exceeds twenty dollars; and *by the statute*, this right is excluded in all cases of admiralty and maritime jurisdiction.

It is therefore utterly impossible to reconcile these decisions, which in my humble judgment are founded in the most accurate and just conceptions of the admiralty jurisdiction, with the narrow and perplexed doctrines of the common law. The argument then, that attempts to engraft them upon the constitution, is wholly untenable.

On the whole, I am, without the slightest hesitation, ready to pronounce, that the delegation of cognizance of "all civil cases of admiralty and maritime jurisdiction" to the courts of the *United States* comprehends all maritime contracts,

⁴⁴ *United States vs. La Vengeance*, 3 Dall. 297.—*The Same vs. The Sally*, 2 Cranch, 406.—*The Same vs. The Betsey and Charlotte*, 4 Cranch, 443.

⁴⁵ Act 24th Sept. 1789, ch. 20, s. 9.

torts, and injuries. The latter branch is necessarily bounded by locality; the former extends over all contracts, (wheresoever they may be made or executed, or whatsoever may be the form of the stipulations,) which relate to the navigation, business or commerce of the sea.

The next inquiry is, what are properly to be deemed "maritime contracts." Happily in this particular there is little room for controversy. All civilians and jurists agree, that in this appellation are included, among other things, charter parties, affreightments, marine hypothecations, contracts for maritime service in the building, repairing, supplying, and navigating ships; contracts between part owners of ships; contracts and *quasi* contracts respecting averages, contributions and jettisons; and, what is more material to our present purpose, *policies of insurance*.⁵⁶ And in point of fact the admiralty courts of other foreign countries have exercised jurisdiction over policies of insurance, as maritime contracts; and a similar claim has been uniformly asserted on the part of the admiralty of *England*.⁵⁷ There is no more reason, why the admiralty should have cognizance of bottomry instruments, as maritime contracts, than of policies of insurance. Both are executed on land, and both intrinsically respect maritime risks, injuries and losses.⁵⁸

⁵⁶ *Cleirac, Le Guidon*, ch. 1, p. 109, ch. 3, p. 124, *Id. Jurisd. de la Marine*, p. 191.—1 *Valin, Comm.* 112, 120, &c. 127, &c.—2 *Emer.* 319.—*Godolph.* 43.—*Zouch*, 90, 92.—*Exton*, 69, &c. 295, &c.—*Malynes Lex Merc.* 303.—*Id. Collection of Sea Laws*, ch. 2, p. 47.—*Consol. del Mare*, ch. 22.—2 *Bro. Adm.* ch. 4, p. 71.—4 *Bl. Comm.* 67.—*The Sandwich, Peters's R.* 233, n.—*Turgot. Reflex.* ch. 1.

⁵⁷ *Boucher's Consol. del Mare*, 2 vol. 730.—1 *Valin, Com.* 120.—2 *Emer.* 319.—*Roccus de Assec. n.* 80.—2 *Bro. Adm.* 80.—*Zouch*, 92, 102.

⁵⁸ *Roccus de Ass.* note 80, declares "These subjects of insurance, and disputes relative to ships, are to be decided according to maritime law; and the usages and customs of the sea are to be respected. The proceedings are to be according to the forms of maritime courts, &c." *Turgot* in his reflections (ch. 1.) defines maritime contracts to be those,

My judgment accordingly is, that policies of insurance are within (though not *exclusively* within) the admiralty and maritime jurisdiction of the *United States*.⁵⁰ I therefore overrule the plea to the jurisdiction, and assign the respondent to answer peremptorily upon the merits.

In making this decree, I am fully aware, that from its novelty it is likely to be put to the question with more than usual zeal; nor can I pretend to conjecture, how far a superior tribunal may deem it fit to entertain the principles, which I have felt it my solemn duty to avow and support. Whatever may be the event of this judgment, I shall console myself with the memorable words of Lord *Nottingham*, in the great case of the *Duke of Norfolk*.⁵¹ "I have made several decrees, since I have had the honour to sit in this place, which have been reversed in another place; and I was not ashamed to make them, nor sorry when they were reversed by others."

Selfridge, for the libellant.

Welsh, for the respondents.

which, according to mercantile usage, respect or concern maritime negotiations and their incidents. It has been already stated that the jurisdiction of the admiralty in *England* and in *Scotland* were originally the same. And the admiralty in *Scotland* still continues to exercise jurisdiction over all maritime contracts, and particularly over policies of insurance, upon the footing of its ancient and inherent rights. In *Dow's* Reports of decisions in the House of Lords in 1813 and 1814, are no less than eight insurance causes, which were originally brought in the admiralty in *Scotland*, and finally decided on appeals by the House of Lords, Lords *Ellenborough*, *Eldon*, and *Erskine*, assisting in the decisions.—*Watt vs. Morris*, 1 *Dow. R.* 32.—*Tennant vs. Henderson*, 1 *Dow. R.* 324.—*Watson vs. Clark*, 1 *Dow. R.* 336.—*Brown vs. Smith*, 1 *Dow. R.* 349.—*Sibbald vs. Hill*, 2 *Dow. R.* 263.—*Hall vs. Brown*, 2 *Dow. R.* 367.—*Smith vs. McNeil*, 2 *Dow. R.* 538.—*Smith vs. Robertson*, 2 *Dow. R.* 474.

⁵⁰ There can be no possible question, that the courts of common law have acquired a concurrent jurisdiction, though, upon the principles of the ancient common law, it is not easy to trace a legitimate origin to it. See ante, page 422.

⁵¹ 3 *Ch. Cas.* 52.

BROWN VS. JONES AND OTHERS.

A mariner shipped on a voyage "from *Boston* to the *Pacific, Indian* and *Chinese Oceans*, or elsewhere, on a trading voyage; and from thence back to *Boston*," with a stipulation, that two months wages should be paid on arrival at *Canton*; the voyage being in fact a trading voyage to the *Northwest Coast* for furs; it was held, that the outward voyage terminated at *Canton*, and that the shipping articles did not authorize a return from *Canton* to the *Northwest Coast*; and that, therefore, it was not a desertion in a mariner to leave the ship at *Canton*, it being the intention of the ship to return to that coast.

It seems, that a "trading voyage" does not include a "freighting voyage."

The words "or elsewhere," in the shipping articles, are either void for uncertainty, under the act of Congress regulating mariners in the merchants' service, or are to be construed as subordinate to the principal voyage stated in the articles.

The statute of limitations of *Massachusetts*, (which as to this point is a transcript of the statute, 21 Jac. ch. 16,) applies only to suits at common law for mariners' wages, and not to suits in the admiralty.

The respondent in the admiralty cannot avail himself of the statute of limitations unless he plead it.

THIS was an allegation in a case of subtraction of wages. It appeared from the evidence, that the libellant, at *Boston*, on the 15th of November, 1805, shipped as a mariner on board of the ship *Eclipse*, on a voyage "from the port of *Boston* to the *Pacific, Indian*, and *Chinese Oceans*, and elsewhere, on a trading voyage, and from thence back to *Boston*." It was farther stipulated in the shipping articles, "that two months wages are to be paid to them, [the officers and seamen] on their arrival at *Canton*, and which are to be the only wages they are to receive during their absence," and "that no officer or mariner is allowed to make any trade in any port or ports whatever, during the present voyage, unless first obtaining leave from the commander on board, under the penalty of forfeiting all his wages and wearing apparel on board the ship *Eclipse*, and farther, if any fur is found with any one, it is forfeited on discovery." In fact, the ship was bound on a trading voyage to the *Northwest Coast* for furs. The ship sailed from *Boston* in Janu-

ary, 1806, went round *Cape Horn* to *California*, thence to the *Sandwich Islands*, and thence to the Russian settlements on the *Northwest Coast of America*. A cargo was there taken on board on *freight* for *Canton*, with which the ship afterwards safely arrived at that port, in the month of February or March, 1807. Previous to the sailing for *Canton*, the master had determined, after unloading his freighted cargo at that port, to return with his original cargo to the *Northwest Coast* for trade, and from thence to go again to *Canton*, before his return to the *United States*; and this determination was well known to the crew. The libellant, having this knowledge, declared his intention not to return to the coast, and accordingly, at *Canton*, sometime between the first and tenth day of March, 1807, and before the freighted cargo was unladen, he secretly left the ship, without a discharge and against the will of the master. This supposed desertion was immediately afterwards inserted in the logbook by the proper officer, and an ineffectual search was made to find him, and compel him to complete the voyage. The ship, still having on board the principal part of her outward cargo, again returned to the *Northwest Coast*, and in September, 1807, was wrecked, at a place called *Oonalaski*, and wholly lost.

The cause was argued by *Selfridge* for the libellant, and *Aylwin* for the respondents.

STORY. J. (after reciting the facts.) Such are the principal circumstances of the case, upon which several points have been argued at the bar.

It has, in the first place, been argued, that the voyage designated in the shipping articles included the second voyage to the *Northwest Coast*, and that this construction is fully supported by the usage in this particular trade. I will not stop to consider, how far the usage of trade is legally ad-

missible to extend the language of a written contract, so as to include an intermediate voyage *not embraced in its terms*; for no such usage is shewn in this case. In order to establish such usage, there must be evidence of a general and uniform course of the trade, so well known, as that all parties must be presumed conusant of it. Occasional instances, in which particular persons have made a second voyage, are not sufficient for this purpose. In the present case, the witnesses declare, that there is no general usage; that whether one or two voyages be made to the *Coast* depends upon the nature of the original outfit, the success of the voyage, the accidents of the seasons, and in short upon all those considerations, which in ordinary voyages influence the judgments of prudent and discreet masters and owners. Every thing, therefore, relative to the effect of a general usage, may be entirely laid out of the case.

And I am satisfied, that by the true construction of these articles, the outward voyage terminated on the first arrival at *Canton*, and did not include an intermediate voyage to the *Coast* and back again. The act of Congress, for the regulation of seamen in the merchants' service, requires, that the voyage or term of service should be specified in the shipping articles. It would be an utter evasion of the statute, to allow such an indefinite expression, as "*elsewhere*," to control or extend the meaning of the other certain description of the voyage, or to constitute, of itself, a sufficient description. I hold, with the learned Mr. Justice *Winchester*,¹ that the term "*voyage*" is a technical phrase, and always imports a definite commencement and end; and that the term "*elsewhere*" must be construed, either as void for uncertainty, or as subordinate to the principal voyage stated in the preceding words. And if there be any doubt as to these words, that doubt is not to be enlarged, so as to cover

¹ 1 *Amer. Law Journal*, 207.

any intermediate voyage back from the *Chinese* to the *Indian* and *Pacific Oceans*. It is analogous to the case of several ports mentioned in a policy of insurance, where it has been held, that the party must avail himself of the ports in the order, in which they stand in the policy, and cannot recur back from the last to any former port. There is too, in this contract, an express reference to *Canton*, as a port where two months wages were to be paid; and as this was to be the only advance during the voyage, it affords a strong inference, that the parties did not contemplate a second voyage to that port, or they would have guarded against a second advance on a second arrival there.

It has, in the next place, been argued, that it is apparent upon the allegations of the parties, that the cause of action accrued more than six years before the commencement of this suit, and that, therefore, it is barred by the statute of limitations of *Massachusetts*, which is substantially a copy of the stat. 21 Jac. ch. 16. The language of this statute does not seem applicable to a proceeding in the admiralty. A libel *in rem*, or *in personam*, is not "an action of account or upon the case," in the legal sense of those terms. In one case,² Lord *Holt* is reported to have held, that the statute of limitations did not extend to causes maritime, spiritual, or equitable, but only to duties at common law; yet, that mariners' wages are a duty at common law, and, if sued for at common law, the statute would be a good bar. From this language it would seem, that his lordship thought the statute no bar to a suit in the admiralty, but a good bar only to a suit at common law. But from other reports of the same case,³ it may be gathered, that his opinion inclined the other way. The cause, however, went off upon an-

² *Ever vs. Jones*, 3 *Salk.* 227.

³ 2 *L. Ray.* 934.—6 *Mod.* 25.—1 *Com. R.* 137.

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other point, and, in a subsequent case,⁴ after considerable discussion, the court appear to have strongly inclined to limit the statute to suits at common law. And very soon afterwards an express statute was made⁵ to cure the defect. The natural inference from this brief review of judicial and parliamentary decisions is, that suits in the admiralty are not within the statute of limitations of 21 Jac. ch. 16; an inference, which, in my judgment, stands entirely confirmed by every rational construction of its language.

It is not a little remarkable, that the act of Congress, regulating suits for mariners' wages in the admiralty, contains no limitation as to the time, within which such suits shall be brought. And as the admiralty and maritime jurisdiction is exclusively confided to the courts of the *United States*, it would be very difficult to maintain, that a statute of limitations of a state could, *proprio vigore*, apply to suits on the admiralty side of these courts. The provision in the 24th section of the judicial act⁶ extends only to trials at *common law*; and in no other cases can state regulations or limitations govern the courts of the *United States*, unless they fall within the principles of universal law, which direct and limit the application of the *lex loci*. However, for the reasons already stated, I am entirely satisfied, that the statute of limitations of *Massachusetts* never was intended to include suits in the admiralty. And, if it were otherwise, it is very clear, that the respondents could not avail themselves of that statute in the present case, for they have not pleaded it. No principle is better established, than that a party may waive the benefit of a statute introduced in his favour; and he is in law deemed so to do in respect to the statute of limitations, unless he spread it before the court, as a special exception or bar to the suit.

⁴ *Hyde vs. Partridge*, 2 L. Ray. 1204.

⁵ 4 Ann. ch. 16.

⁶ 24 Sept. 1789, ch. 20.

It has, in the next place, been argued, that the wages were completely forfeited by the desertion of the libellant at *Canton*. And there can be no doubt, that, both by the marine law and by the act of Congress, a desertion *duly proved* works this penalty, unless it be justified or excused upon the principles of law. It is contended by the libellant, that he is within the exception; first, because the taking on board of freight for *Canton* was a deviation from the voyage; and, secondly, because, at all events, he was not bound to return to the *Coast* from *Canton*, as was the settled and avowed intention of the master.

The voyage, described in the shipping articles, was to the *Pacific, Indian, and Chinese* oceans, "on a trading voyage," which seems pointed to a commerce by buying and selling on account of the original owners and shippers, and not to the intermediate transportation of cargoes on freight. The latter employment is usually denominated a *freighting* and not a *trading* voyage. But, in as much as the voyage from the Russian settlements to *Canton* was clearly within the terms of the original contract, the taking on board of the freight cannot be deemed a deviation, unless it occasioned unnecessary and unusual delay. This has not been established by the evidence, and therefore, until the arrival at *Canton*, the seamen were bound to remain by the ship. Were they bound to remain, after the arrival at that port, until after the cargo on freight was unladen, and the master had done some act towards an equipment for a return to the *Coast*?

In my judgment, they were not bound to remain. The cargo on freight was not within their original contract, and they were not bound to remain by the ship for the sole purpose of assisting in the unlivery, after a reasonable time had elapsed for the fulfilment of all their other duties to the ship. The master had repeatedly declared his intention to

 Ex parte, Lewis.

return to the Coast, and had kept the original cargo on board for that purpose; and as there is no evidence to shew, that the desertion was under circumstances unreasonable or injurious, it seems to me, that the conduct of the master, coupled with his avowed intentions, authorized the mariner to hold himself absolved from a farther performance of his contract. If the ship had, notwithstanding, returned *directly* to the United States, a very different question might have arisen. But here the subsequent events completely established the correctness of the conclusions of the mariner, as to the abandonment of the voyage.

The judgment of the District Court, decreeing wages, must therefore be affirmed with costs.

 EX PARTE LEWIS, &c.

A wharfinger has a lien on a foreign ship for wharfage by the law of the admiralty. But if the wharfinger has made an express personal contract with the ship owner, the

Court will not give the wharfinger a priority of claim over a bottomry interest, which previously attached on the ship.

Quesre, if such personal contract be a waiver of the lien?

THIS was an application on petition for the payment of the dockage due on the ship *Jerusalem*, which had been libelled on a bottomry bond, and sold under an interlocutory order of this Court, and the proceeds of the sale brought into the registry. The ship was still lying at the plaintiffs' wharf, when she was arrested upon the admiralty process pending in this Court.¹

STORY, J. The first question is, whether this charge, being against a foreign ship, constitutes a lien upon the ship

¹ *Ante p.* 191.

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itself. No case in point has been cited. In the ship *Jersey*,² Mr. Justice *Peters* stated, that he had allowed wharfage out of remnants and surplusses, as the wharfinger might detain the ship until payment. His opinion is therefore very clearly in favour of the lien. And it seems to me fully supported in principle by the doctrines, as well of the common law,³ as of the civil law,⁴ and by the analogous cases of materials furnished and repairs made upon the ship.⁵ To be sure, the case of *Justin vs. Ballam*⁶ looks strongly the other way, as to a lien for repairs; but, after much consideration, I have, in a former case in this Court, felt myself bound to decide against its authority.⁷

If the dockage be a lien, is it a privileged lien, having a priority over the bottomry interest? It being indispensable for the preservation of the vessel, it seems to me that it must necessarily be so considered. If it had been due for a former voyage, or the wharfinger had parted with the possession, the case would have been entirely altered.

The remaining question is, whether the plaintiffs have parted with their lien in the present case. Here is a personal contract, between them and the ship owner, for the payment of a specific rate of dockage, and an order drawn on the ship's agents for the payment thereof quarterly. It did not strike me, that upon principle such a contract could amount to a waiver of the lien; because it was in effect only ascertaining the rate of dockage, instead of leaving it in uncertainty, and upon the footing of a *quantum meruit*, or the

² 1 *Peters*, R. 223.

³ *Naylor vs. Mangles*, 1 *Esp. R.* 109.—*Spears vs. Hartley*, 3 *Esp. R.* 81.—*Saville vs. Barchard*, 4 *Esp. R.* 53.

⁴ 1 *Domat. Lib.* 3, tit. 1 § 5, p. 9.

⁵ See *Roccus de nav.* note 92, 93.—2 *Brown. Adm.* 142, 198.—*Abbott on Shipp. Part 2*, ch. 3, § 9.

⁶ 2 *Ld. Ray.* 805.

⁷ *The Jerusalem*, ante. p. 345.

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usual rate of dockage. But there is a series of authorities directly in point, which decide, that where the parties enter into a personal contract for a specific sum, it is a discharge of the implied lien resulting by operation of law. And I cannot find that these authorities have ever been doubted or denied.⁸ I am free to confess, that I am better satisfied with authorities, when I can perceive the reason of them; but sitting in a court of admiralty, and exercising an equitable relief against highly meritorious parties, I should not choose *collaterally* to overrule such explicit decisions. I must therefore dismiss the present petition, reserving however the right to reconsider these doctrines, when they shall come directly in judgment upon an original libel *in rem*. It is proper to add, that the admiralty jurisdiction in this class of cases is altogether independent of the doctrine of liens.

Petition dismissed.

Fales, for the petitioners.

Hubbard, for the bottomry creditor.

⁸ *Anon. Yelv.* 66.—2 *Roll. Ab.* 92. *M.* 1, 2.—*Brenan vs. Curint, Sayer's R.* 224.—*S. C. more fully Selwyn, N. P.* 1163.—*Collins vs. Ongley cited, Selwyn, ibid.*—*Francis vs. Wyatt.* 3 *Burr.* 1498.

UNITED STATES IN ERROR vs. HAYWARD.

The repealing clauses in the act of 1814, ch. 115, did not operate strictly as repeals of the act of 1st of March, 1800, ch. 91, so far as revived by the act of 2d of March, 1811, ch. 96, but as exceptions to the general provisions of those acts in favour of British goods imported in neutral vessels.

In an information on those acts, for an importation of goods in a vessel not neutral, *quere*, if it be necessary to negative in the information the neutrality of the vessel.

A traverse to an averment, in such an information, that the goods were imported in a vessel not neutral, merely in the negative, is bad.

On whom the burthen of proof lies in cases within the exceptions of a statute prohibition. In cases of negative allegations, the burthen of proof rests on the

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party holding the affirmative, especially where the facts lie particularly in his privacy and knowledge.

The burthen of proof of the vessel's being neutral, in an information on the statutes before recited, rests on the claimant.

By the conquest and occupation of *Castine* by the enemy, that territory passed under the temporary allegiance and sovereignty of the enemy; and of course, the sovereignty of the *United States* was, during the same period, suspended, and the laws of the *United States* could no longer be rightfully enforced there. *Castine*, during such occupation, was not a port of the *United States* with reference to the non-importation acts. Therefore, the bringing of British goods from *Habifax* to *Castine*, during that occupation, was not an offence against those acts.

No person can be permitted to set up the defence, that goods unladen within the 27th section of the act of 2d March, 1799, ch. 128, were unladen by unavoidable accident, necessity or distress, unless he has made the requisite proofs thereof stated in that section, before the collector, or has been prevented by inevitable accident, &c. from furnishing such proofs.

It is no legal evidence of such proofs having been furnished to the collector, that he has admitted the goods to entry; nor is such entry any legal evidence of the existence of such accident, necessity or distress. The belief of the collector is no legal evidence of the existence of such accident, necessity or distress. The presumption, which the law makes in favour of the good faith and integrity of the collector, is for his own protection; but it can, in no respect, vary the rights of third persons, or change the general rules of evidence applicable to such rights.

It is a good defence under the 90th sec. and 92d sec. of the act of 2d March, 1799, ch. 128, that the party has been prevented, by inevitable accident, necessity or distress, from complying with the requisitions thereof. But such defence is not allowable under a plea, which simply puts in issue a denial of the facts constituting a forfeiture within those sections.

If the proper port of entry for the District be in possession of the enemy, the collector of the customs has a right to remove the customhouse to some other convenient port within the District, and there to admit vessels to entry. If an unlivery of a foreign vessel, at the port of entry for the District, become impossible from the port being in possession of the enemy, and such unlivery be indispensable for the preservation of the property, it may be lawfully made at a port of delivery only.

What constitutes a case of unavoidable accident, necessity or distress. An imminent and immediate danger of capture, &c. constitutes such a case; but not if the danger be remote, or not instant and pressing. To authorise an unlading under the 27th sec. of the act of 2d March, 1799, as in a case of accident, necessity or distress, the danger of capture must act directly on the goods or vessel, and the circumstances must be such, as render an immediate unlading indispensable to the safety of the goods, and not merely such as render it hazardous or impracticable to carry the goods to their port of destination.

THIS was a writ of error from the District Court of *Massachusetts*, upon an information *in rem* against one hundred

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and forty-nine packages of goods seized upon land for an alleged illegal importation into the *United States*. The information contained six counts. The first alleged, that the goods, being articles the importation whereof into the *United States*, in any other than neutral vessels, was prohibited by the act entitled; "an act to interdict the commercial intercourse between the *United States*, &c."¹ were imported in *some vessel not being a neutral vessel*, the name whereof was unknown to the District Attorney, into the *United States*, to wit, the District of *Penobscot*, from a place situated in a colony and dependency of *Great Britain*, to wit, from some place in *Nova Scotia*, against the statutes in such case made and provided.² The second alleged, that after the arrival of said vessel from a foreign port within the limits of the *United States*, to wit, the District of *Penobscot*, and before the said vessel had come to the proper place for the discharge of her cargo or any part thereof, and before she was duly authorized by the proper officers of the customs to unlade the same, the said goods were unladen from out of said vessel for some purpose, *without any unavoidable accident, necessity or distress of weather*, against the statute, &c.³—The third alleged, that the goods were imported into the *United States*, from a port or place in the actual possession of *Great Britain*, in certain vessels, which were not, at the time of said importation, neutral vessels, and the said goods not being a part of the cargo of *American vessels*, which had cleared out for the *Cape of Good Hope*, &c. prior to the 10th of November, 1810, against the statutes, &c.⁴

The fourth alleged, that the goods, being foreign goods, subject to duties upon importation, were brought from some

¹ 1 March, 1809, ch. 91.

² 1 Mar. 1809, ch. 91.—1 May, 1810, ch. 56.—2 Mar. 1811, ch. 96.—14 April, 1814, ch. 115.

³ 2 Mar. 1799, ch. 128, s. 27. ⁴ 1 Mar. 1809, ch. 91, &c.

foreign port or place into the *United States*, to wit, the District of *Penobscot*, in other manner than by sea, the same not having been brought into or through any district in the northern, northwestern, or western boundaries of the *United States*, adjoining to the dominions of *Great Britain* in *Upper* and *Lower Canada*, nor into or through any district on the river *Ohio* or *Mississippi*, against the statute, &c.⁵ The fifth alleged, that the goods, being liable to duties, were imported into the *United States*, from some foreign port or place, and were afterwards unladen and delivered from the vessel in the District of *Penobscot* without a special license or permit, against the statute, &c.⁶ The sixth alleged, that the goods, being of foreign growth and liable to duties, and not having been brought into or through any district on the northern, northwestern or western boundaries of the *United States*, &c. were brought in some vessel from some foreign port or place into the district of *Penobscot*, and there unladen and landed from said vessel at a port other than a port directed by the act of Congress made and passed on the 2d of *March*, 1799, entitled "an act, &c." to wit, at a port called *Orrington*, in said district of *Penobscot*, against the statute, &c.⁷

To the first count the claimant pleaded, that the goods were imported into the district of *Penobscot*, on the 9th of November, 1814, in a neutral vessel called the *Christina*, without this, that the goods were laden and put on board of a vessel, not being a neutral vessel, with the knowledge of the master and owner of said vessel, and with intent to import the same into the *United States*, and that the same were imported in pursuance of such intention into the district of *Penobscot* in said vessel, as the *United States* had alleged, and thereof put himself on the country. And the *United States* did the like.

⁵ 2 Mar. 1799, ch. 128, sec. 92. ⁶ 2 Mar. 1799, ch. 128, sec. 50.

⁷ 2 Mar. 1799, ch. 128, sec. 92.

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To the second count he pleaded, that the goods were not unladen from any vessel for any purpose in the district of *Penobscot*, before the said vessel had come to the proper place for the discharge thereof, without any unavoidable accident, necessity or distress of weather, in manner, &c. ; and thereof put himself on the country : and the *United States* did the like. To the third he pleaded, that the goods were not imported into the *United States* from a port or place in the actual possession of *Great Britain*, in vessels, which were not, at the time of such importation, neutral vessels in manner, &c. ; and thereof put himself on the country : and the *United States* did the like. To the fourth he pleaded, that the goods were not brought from some foreign place into the district of *Penobscot* in other manner than by sea, contrary to the form of the statute, in manner, &c. ; and thereof put himself upon the country : and the *United States* did the like. To the fifth he pleaded, that the goods were not unladen and delivered without a special license or permit in manner, &c. ; and thereof put himself on the country : and the *United States* did the like. To the sixth he pleaded, that the goods were not unladen and landed from said vessel, in which they were imported from said foreign port, at a port other than a port directed by said act of Congress, or any other act or law of the *United States*, in manner, &c. ; and of this, he put himself upon the country : and the *United States* did the like.

Upon the trial in the District Court all the issues were found in favour of the claimant, and the cause came to the Circuit Court upon a bill of exceptions, tendered and sealed at the trial.

There was a mass of testimony and documents attached to the bill of exceptions, from which such facts and circumstances only are abstracted, as materially affect or explain the opinion of the Court. It appeared, that *Castine* was

taken possession of by the British troops, on the first of September, 1814, and was held in their possession until after the treaty of peace. After taking possession, the Governor of *Nova Scotia* issued a proclamation claiming the whole country east of the *Penobscot River*, as attached to the British Sovereignty by right of conquest. *Orrington* is on the east side of the river, but had never surrendered to the British arms, and always continued to assert and claim its American rights and privileges, and to obey the laws of the *United States*. After the capture of *Castine*, the Collector removed the customhouse to *Hampden*, on the west side of the river, and there continued until the treaty of peace. The goods in question were bought in *Halifax, Nova Scotia*, on the first of October, 1814, by a Mr. *John Nyman*, who afterwards at *Hampden*, on the 11th of Nov. 1814, made a bill of sale of them to the claimant. How or when the goods were brought from *Halifax* did not distinctly appear; but they were found on land at *Orrington*, about the beginning of the same month of *November*, and were there seized, and soon afterwards released from seizure. They were then shipped on board of a small sloop, called the *Christina*, commanded by a Mr. *William P. Unger*, and transferred to *Hampden*, and were there, on or about the ninth of *November*, admitted to an entry by the collector of the district, as foreign goods imported in a foreign vessel from *Orrington*, and accordingly the foreign duties were secured, as in ordinary cases of importations from foreign ports. The sloop was American built, and was, until the 14th of October, 1814, enrolled and licensed for the coasting trade in the district of *Penobscot*, by the name of the *Union*. On that day, she was sold to Mr. *Unger*, the master, who called himself a Swedish subject, although it was in proof, that he had been for several years domiciled in the *United States*. At the time of the trans-

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portation of the goods, the sloop was navigating under a pass from *Mr. Soderstrom*, the Swedish Consul, dated the 14th of the same October, and recognising her as entitled to the benefits of the Swedish flag, but her crew, with the exception of the master, were all Americans.

The directions of the judge, who tried the cause, are thus stated in the Bill of Exceptions ;

“ The District Judge did declare and deliver his opinion to the Jury under the first and third counts aforesaid, that upon the evidence aforesaid they were bound to consider *Orrington* as in possession of the *United States*, and the bringing of the said goods, claimed by said *Hayward*, from said *Orrington* to *Hampden*, was not a violation of either of the acts, on which the first and third counts in the information were founded, whatever might be the national character of the vessel, in which the said goods were so brought ; that if the goods were brought to *Orrington* from a British port in a vessel not neutral, they were liable to forfeiture, but that it was incumbent on the *United States* to prove to the satisfaction of the jury, that the vessel, in which the goods might have been brought, was not neutral ; that *Castine* was to be considered as a foreign port, and that it was not sufficient, as to all the purposes of this libel, to entitle the *United States* to a verdict on these counts, to prove that the goods were brought from *Halifax*, a place in a British colony, to *Castine*, and with these directions he left the evidence upon the first and third counts to the jury.

“ And the said judge did, then and there, deliver his opinion and direct the said jury, that, under the other counts, it being admitted that the goods claimed were purchased at *Halifax*, in the province of *Nova Scotia*, and soon after found at *Orrington*, it was a fair presumption, that the goods were imported into *Orrington* from *Halifax*, no ac-

count or explanation being given by the claimant; that the goods must have been brought thither, either by land or by sea; if by land they were liable to forfeiture under the fourth count; if by sea, the goods were liable to forfeiture under the second, fifth and sixth counts, unless the case should be found by the jury to be a case within the purview of the 27th section of the act, entitled 'an act to regulate the collection of duties upon imports and tonnage,' and they should acquit the goods upon the ground of unavoidable accident, necessity, or distress of weather, according to the terms of the exception contained in that section of the said act, which the jury might do, *although the specific evidence of such unavoidable accident, necessity or distress of weather, which is pointed out by the said twenty-seventh section of the said act, had not been shown on the trial;* and that, if the jury should so acquit the goods, upon the said last mentioned grounds, on the second count, *it would be their duty to acquit them also upon the fifth and sixth counts in the information;* that as the goods had been admitted to an entry by the collector at *Hampden*, *it would be competent for the jury to presume from that circumstance, not only that the goods were unladen through unavoidable accident, necessity or distress of weather, but that notice thereof was given to the collector at Hampden, and oath made before the said collector, agreeably to the requisition of the twenty-seventh section of the act aforesaid, though such presumption might indeed be repelled by facts and circumstances, given or appearing in evidence in the cause.*

"And the said judge did, then and there, farthermore deliver it as his opinion, and accordingly direct the jury, that in as much as the government of the *United States* had, prior to the importation in question, manifested by a proclamation from the President of the *United States*, and by

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a repeal of the non-importation acts theretofore existing, a strong disposition to encourage importations of merchandise in neutral vessels; and as there was existing, at the time of this importation, a blockade by the enemy of all the ports in the eastern country, and as the only port of entry in the district of *Penobscot* was then actually in the military possession of the enemy, whereby the approach of neutral vessels to the ports in that section of the country in the usual and ordinary course was rendered extremely hazardous, if not actually impracticable; an emergency arising from such a state of things might, in reference to the importation in question, fairly be considered by the jury, as constituting a case of unavoidable "accident, necessity and distress" within the fair intent and meaning of the exception in the 27th section of the act before mentioned. And if the jury should find reason to believe that the goods in question were, under such circumstances, considered by the collector as innocently or excusably landed at *Orrington* under the 27th section of the act aforesaid, and were thereupon admitted to entry, that condemnation could not now be had in this prosecution, for that cause. And with the above directions, as to the second, fourth, fifth and sixth counts, to the jury, the said judge left with them the cause."

Blake, District Attorney, argued in support of the exceptions, and *Prescott* and *Hubbard*, *contra*.

STORY, J. Several exceptions have been taken in the argument to the directions of the Court. It is contended in behalf of the *United States*, that the charge as to the first and third counts is erroneous, 1. because, under the circumstances, it was not incumbent on the *United States* to prove, that the vessel, in which the goods might have been brought, was not *neutral*; 2. because it was sufficient to maintain these counts, to prove that the goods were brought from *Halifax* to *Castine*.

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In order to understand the first of these objections, it is necessary to review the provisions of the act, upon which these counts are founded. The act of the 1st of March, 1809, ch. 91, sec. 4, provides, that "it shall not be lawful to import into the *United States*, or the territories thereof, any goods, wares or merchandise whatever from any port or place situated in *Great Britain* or *Ireland*, or in any of the colonies or dependencies of *Great Britain*, nor from any port or place situated in *France*, or in any of her colonies or dependencies, nor from any port or place in the actual possession of either *Great Britain* or *France*. Nor shall it be lawful to import into the *United States*, or the territories thereof, from any foreign port or place whatever, any goods, wares or merchandise whatever, being of the growth, produce or manufacture of *France*, or of any of her colonies or dependencies, or being of the growth, produce or manufacture of *Great Britain* or *Ireland*, or any of the colonies or dependencies of *Great Britain*, or being of the growth, produce or manufacture of any place or country in the actual possession of either *France* or *Great Britain*."—The first clause, therefore, prohibits the importation of any goods whatever from the *British dominions and possessions*, and on this the first and third counts are founded. The only substantial difference between these counts is, that in the first the goods are alleged to be imported from a place in a *colony or dependency of Great Britain*; in the third, from a place in the *actual possession of Great Britain*.

The second clause prohibits the importation of goods of British growth or manufacture, *from any foreign port or place whatever*.

This act was repealed, as to *Great Britain*, by the President's proclamation issued under the 11th section of the act, which repeal was confirmed by the act of the 28th of

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June, 1800, *ch. 9*; and the whole act expired by its own limitation on the first day of May, 1810. The act of 1st of May, 1810, *ch. 36, sec. 4*, authorized the President to revive certain sections (including that already recited) against *Great Britain* or *France*, in case of a revocation of the edicts of either, which violated our neutral commerce. And accordingly, by the President's proclamation, these sections were revived against *Great Britain*, to take effect on the 2d of February, 1811; and the act of 2d of March, 1811, *ch. 96, sec. 3*, confirmed this revival, and directed these sections to be immediately carried into effect "against *Great Britain*, her colonies and dependencies." These sections accordingly remained in full force, until by the act of 14th of April, 1814, *ch. 115*, it was enacted, "that so much of any act or acts, as prohibits the importation of goods, wares or merchandise, of the growth, produce or manufacture of *Great Britain* or *Ireland*, or of any of the colonies or dependencies thereof, or of any place or country in the actual possession of *Great Britain*, and so much of any act or acts as prohibits importation into the *United States* or the territories thereof, in *neutral ships* or *vessels*, from any port or place situated in *Great Britain* or *Ireland*, or in any of the colonies of *Great Britain*, be and the same is hereby repealed," with a proviso, prohibiting any importation of goods, the property of the enemies of the *United States*.

Much difficulty has resulted from this inartificial mode of legislation. It is oftentimes a subject of peculiar embarrassment, as well as delicacy, to give a consistent construction to language so loose, as that employed to designate the revival and repeal of the above mentioned acts. The language of the provisions of the act of 1800, *ch. 91*, is directed against *Great Britain* and *France*, their colonies and dependencies, and places in the actual possession

of either. The act of 1811, *ch. 96*, revives those provisions as to "*Great Britain, her colonies and dependencies*" only, leaving out the words "places in the actual possession of *Great Britain*." To give any construction, therefore, to this act, we must in fact strike out of the act of 1809, every word relating to *France, her colonies and dependencies*, and perhaps also to all places in the actual possession of *France or Great Britain*. This is indeed a perilous procedure, and it is not quite certain, that it can, in all cases, be done, and yet preserve the sense and integrity of the text.

But the act of 1814, *ch. 115*, is yet more embarrassing. The first clause, which has been cited, explicitly repeals the second clause of the fourth section of the act of 1809, *ch. 91*. And yet it is very clear from the proviso, that the legislature meant to except importations upon account of the enemies of the *United States*. British goods imported into the *United States* during the war, upon British account, must still be deemed within the penalties of the act of 1809, (and of course the act must remain in force for this purpose,) as well as be subject to the forfeitures arising from the law of war.

In respect to the second repealing clause of the act of 1814, there is yet more difficulty; for there is no part of any act of Congress, which, in terms, prohibits importations in *neutral vessels*, from *Great Britain, her colonies or dependencies*. Construing the clause, therefore, in its literal sense, it is utterly void, for there is no *descriptio rerum*, if I may so say, to which it can attach. To give it any legal effect, we must construe it, not as a repeal of any existing provision, but as a qualification or exception, enabling neutral vessels, notwithstanding the existing laws, to import goods from *Great Britain* and her colonies. And, in this view, it operates as a proviso upon the first clause of the

fourth section of the act of 1809, ch. 91. In aid, therefore, of the manifest intention of the legislature, however incautiously expressed, we must deem both of the repealing clauses of the act of 1814, ch. 115, not as repeals of the act of 1809, but as positive exceptions to the general provisions of that act. Upon any other construction, the act of 1809 would be completely repealed even as to cases directly excepted from the repealing clauses, to wit, importations in vessels not neutral, and of goods the property of enemies. But, upon the construction now stated, all the words have an effect, and the objection urged at the argument is avoided, (*viz.* that British and American vessels are not now authorized to import British goods) because, by the treaty of peace, the character of enemy is extinguished, and the British and Americans must be held neutral to each other.

Having thus settled the construction of the acts, on which the first and third counts are founded, we may now recur to the objections already stated to the charge of the Court.

The first objection depends upon the solution of the point, upon whom the burthen of proof rested, as to the neutrality of the vessel, in which the goods were imported. It is very doubtful, whether it was necessary, in the count, to allege that the goods were imported in a vessel not neutral; for the general rule of law is, that it is sufficient to negative the exceptions in the enacting clause of a statute, and exceptions, which come in by way of proviso, or in subsequent statutes, are properly matter of defence for the defendant.³ The present case seems to fall within the rule, and is not easily, if at all, distinguishable. But it is not necessary to decide this point, because the count does, in fact, negative the vessel's being neutral.

³ *Rex vs. Jarvis*, 1 Burr. 148.—S. C. 1 East. 643, note.—*Spierres vs. Parker*, 1 T. R. 141.—*Rex vs. Stone*, 1 East. R. 639.—*Rex vs. Pemberton*, 2 Burr. 1035.

It is argued on behalf of the *United States*, that, notwithstanding the averment, the defendant is bound to prove the affirmative, because in his first plea he has expressly alleged, that the goods were imported in a neutral vessel, called the *Christina*. But this averment is mere inducement to a traverse of the averment in the first count. In general, the inducement to a traverse is not of itself traversable; much less is the matter of it to be proved in any issue founded upon the traverse. In the present case, the traverse was intended to deny the whole of the material averment in the count, and accordingly it concludes to the country. To be sure, it was open to the objection of being too broad in its terms, and not sufficiently pointed to the averment in the count, and perhaps also of putting in issue a negative allegation; but these objections were available only upon demurrer, and the attorney for the *United States*, by joining the issue, has waived the benefit of them. By the mere shape of the pleadings, therefore, the *onus probandi* is not thrown upon the claimant.

Is it thrown upon him by the rules of law applicable to a case of this nature? In general, the party claiming a forfeiture or penalty is bound to make out his case precisely. Nor is it a necessary exception, that it involves the proof of a negative allegation. For if the law presume the affirmative, the party may still be put to the proof of the negative.⁹ Therefore, if the charge consist in a *criminal neglect* of duty, as the law presumes the affirmative, the burthen of proof of the contrary is thrown on the other side.¹⁰ But in other cases, as where the negative does not admit of direct proof, or the facts lie more immediately with-

⁹ *Gilb. Ev.* 146.—*Wilson vs. Hodges*, 2 *East. R.* 312.—*Frontine vs. Frost*, 3 *Bos. and Pul.* 302.

¹⁰ *Williams vs. East India Company*, 3 *East. R.* 192.—*Bull. N. P.* 198.—*Frontine vs. Frost*, 3 *Bos. and Pul.* 302.

in the knowledge of the defendant, he is put to his proof of the affirmative. And where the general facts, which constitute a forfeiture within a statute, are proved, and there are exceptions to its operation in particular cases, the better opinion certainly is, that the party, who would avail himself of the exception, must prove it; although from the forms of pleading it may be necessary to negative every exception in the indictment or information. Such negative allegation is, in such cases, to be repelled by affirmative proof on the other side. Therefore, in an action on the game laws, (which must negative that the party has any of the qualifications of the statute) it is not incumbent on the plaintiff to prove the disqualifications of the defendant; for this is negative matter, and the affirmative comes more properly in the defence.¹¹

Let us compare the present case with these rules. The act of 1809 prohibited all importations of goods from British ports. The act of 1814 excepted importations from British ports in neutral vessels. From the evidence in the case it does not appear, that the plaintiffs knew in what vessel the importation was made, but this was a fact peculiarly within the knowledge of the defendant. Besides, the fact of importation being proved, from a British port into the port of *Orrington*, (which must be taken as a necessary preliminary, so far as respects this part of the charge of the court) the case fell within the general words of the act of 1809, and the exception, that they were imported in a neutral ship, was properly matter of defence. The law did not presume that the vessel was neutral in favour of the defendant. The charge was not against the defendant personally of a criminal neglect of duty, but against the

¹¹ *Rex vs. Stone*, 1 East. R. 637.—*Frontine vs. Frost*, 3 Bos. and Pul. 307, note b.—*Rex vs. Cromther*, 1 T. R. 125.—*Spierces vs. Parker*, 1 T. R. 141.

goods only, of a positive act, to wit, an illegal importation. And to call upon the plaintiffs to prove that the vessel was not neutral, was to require the proof of a negative allegation, which the plaintiffs had no means in their power to prove, and proofs of the contrary of which, if they existed, were within the reach of the defendant. I cannot distinguish the present case in principle from those, which have been decided on the game laws. There, the declaration must allege, that the defendant is not duly qualified, negating specifically all the exceptions of the statute; and yet it seems admitted, that if the act of killing game be proved, the burthen of proof of his being within the exceptions of the statute is thrown on the defendant. It is perhaps not easy to reconcile with these decisions some of the general doctrines stated in some of the authorities. Such, for instance, as the doctrine, that wherever the charge involves criminality, the law will not easily suppose it; and therefore, if the charge contains a negative, the law will presume the affirmative without proof. If this were universally true, then, under the game laws, the proof of the not being qualified ought to be shewn by the plaintiff, for the charge is clearly of a criminal nature. Without pretending to reconcile all the *dicta* in the books, it seems to me, that in respect to negative allegations, the reasonable rule is, that the burthen of proof shall rest on the party, who holds the affirmative; and especially where the facts are peculiarly within his privity and cognizance: and that this rule applies more strongly, where the party seeks to shelter himself under an exception, which was not incorporated into the original prohibition of the statute creating the offence. An exception may, perhaps, properly hold, where the charge substantially consists in a criminal neglect or omission of duty. It seems to me, therefore, that the burthen of proof, in the case at bar, that the vessel in which the

goods were imported was neutral, lay on the claimant and not on the *United States*, and that in this respect the charge of the learned Judge was erroneous.

The second objection is, that the Court directed the Jury, that *Castine* was, under the circumstances, a foreign port. By "foreign port", as the terms are here used, may be understood a port within the dominions of a foreign sovereign, and without the dominions of the *United States*. The port of *Castine* is the port of entry for the district of *Penobscot*, and is within the acknowledged territory of the *United States*. But, at the time referred to in the bill of exceptions, it had been captured, and was in the open and exclusive possession of the enemy. By the conquest and occupation of *Castine*, that territory passed under the allegiance and sovereignty of the enemy.¹² The sovereignty of the *United States* over the territory was, of course, suspended, and the laws of the *United States* could no longer be rightfully enforced, or be obligatory upon the inhabitants, who remained and submitted to the conquerors. *Castine*, therefore, could not, strictly speaking, be deemed a port of the *United States*; for its sovereignty no longer extended over the place. Nor, on the other hand, could it, strictly speaking, be deemed a port within the dominions of *Great Britain*, for it had not permanently passed under her sovereignty. The right which existed was the mere right of superiour force, the allegiance was temporary, and the possession not that firm possession, which gives to the conqueror *plenum dominium et utile*, the complete and perfect ownership of property. It could only be by a renunciation in a treaty of peace, or by possession so long and permanent, as should afford conclusive proof, that the territory was altogether abandoned by its sovereign, or had been irretrievably subdued, that it could be considered as incorporated into the dominions of the

¹² [See *Dodson's Adm. R.* 451.]

British sovereign. Until such incorporation, by a recapture or repossession, the territory would be entitled to the full benefit of the law of postliminy. If then by the term "foreign port" were intended a port *absolutely* within the dominions of a foreign sovereign, and incorporated into his realm, it might be very doubtful, if the direction of the Court could be sustained. But it seems to me, that taking the whole direction together, in reference to the first and third counts, it meant no more, than that *Castine*, being in the possession of the enemy by right of conquest, it was no longer to be considered as a port of the *United States*, with reference to the non-importation acts, but that, so far as respected the obligatory force of the laws of the *United States*, it was to be considered a "foreign port," or port *extra ligeantiam reipublicæ*. And in this view the direction may well, in point of law, be supported.

This leads me to the third objection, *vis.* that the bringing of the goods from *Halifax* to *Castine* was sufficient to all purposes, to entitle the *United States* to a verdict on the first and third counts, whereas the Court directed the jury to the contrary. Without stopping to examine, whether the single fact of bringing the goods from *Halifax* to *Castine* was of itself, "to all the purposes of this libel," sufficient to entitle the *United States* to a verdict on these counts, as the opinion guardedly expresses it, let us attend to the substance of the objection. It rests altogether upon the assumption, that *Castine* was to be deemed a port of the *United States*, in which the laws had their full operation, notwithstanding it was, at the time of the supposed importation, in the actual possession of *Great Britain*. This position, however, is utterly inadmissible upon every principle of the law of nations. By the conquest and occupation, the laws of the *United States* were necessarily suspended in *Castine*; and by their surrender the inhabitants became subject to such laws, and

such laws only, as the conquerors chose to impose. No other laws could, in the nature of things, be obligatory upon them, for where there is no protection or sovereignty, there can be no claim to obedience. This objection, therefore, must be also overruled.

The next exception is to the instruction of the Court to the jury in respect to the second, fifth and sixth counts. It is argued, that this instruction is erroneous, because the Court directed the jury ; 1. That the jury might acquit the goods upon the ground of unavoidable accident, necessity or distress of weather, although the specific evidence thereof, which is pointed out in the 27th section of the collection act,¹³ had not been shewn on the trial. 2. That, as the goods had been admitted to an entry by the collector, they might presume from that circumstance, not only that the goods were unladen through unavoidable accident, necessity or distress of weather, but that notice thereof was given to the collector at *Hampden*, and oath made before him agreeably to the requisitions of the 27th section of the collection act of 2d of March, 1799, ch. 128, whereas no such presumption could be legally made. 3. That if they should acquit the goods upon the ground of unavoidable accident, necessity or distress of weather, upon the second count, it was their duty to acquit them also upon the fifth and sixth counts, whereas no such legal consequence followed. 4. That considering the President's proclamation inviting neutral trade, the repeal of the non-importation acts, the blockade of the whole eastern coast of the *United States* by the enemy, the military possession of *Castine* by the enemy, which was the only port of entry of the district of *Penobscot*, whereby the approach of neutral vessels was rendered extremely hazardous, if not impracticable ; an emergency arising in such a state of

¹³ 2 Mar. 1799, ch. 128.

things might, in reference to the importation in question, be deemed as a case of unavoidable accident, necessity and distress, within the intent and meaning of the said 27th section of the act aforesaid.

To understand these objections, it will be necessary to advert to the acts, upon which the second, fifth and sixth counts are founded, and to the points put in issue by the pleadings to the same counts. The second is founded on the 27th section, of the act of 2d of March, 1799, ch. 123, which provides, that if, after the arrival of any ship laden with foreign goods and bound to the *United States*, within the limits of any of the districts of the *United States*, or within four leagues of the coast thereof, any part of the cargo shall be unladen, for any purpose whatsoever, from out of such ship, before such ship shall come to the proper place for the discharge of her cargo or some part thereof; and shall be duly authorized, by the proper officer of the customs, to unlade the same, the master, &c. shall forfeit, &c., and the goods so unladen shall be forfeited and lost, except in the case of some unavoidable accident, necessity or distress of weather; of which unavoidable accident, necessity or distress of weather the master, &c. shall give notice to, and together with two or more of the officers or mariners, &c. on board such ship, shall make proof upon oath before the collector, &c. of the customs of the district, within which such accident, necessity or distress shall happen, &c. &c. The count charges that the goods were so unladen without any unavoidable accident, necessity or distress of weather; and the plea alleges, that the goods were not so unladen without any unavoidable accident, necessity or distress of weather, and concludes to the country. This is plainly a negative traverse, and would have been bad upon special demurrer, but is aided by the joinder of the issue.

The first objection supposes, that the proofs, required to be made before the collector, of the unavoidable accident, necessity or distress, were indispensable prerequisites, to entitle the claimant to avail himself of such defence. At the argument, the inclination of my mind was strongly against the validity of this objection. It struck me, that it sounded harsh, to deprive the party of his defence at common law, unless the proofs had been made pursuant to the 27th section of the statute. But, upon farther reflection, that opinion has been changed. The prohibition of unloading goods without unavoidable accident, &c. was intended to guard the revenue against the fraudulent practice of smuggling. To prevent impositions under false and frivolous pretences of accident, &c. it was deemed proper to interpose as a check, that the facts should be immediately notified and proved before the collector. But the whole object of the provision would be completely defeated, if the party might wantonly omit to give such proofs, and yet avail himself of the defence. It seems necessary, therefore, to effectuate the manifest intention of the act, to hold, that a compliance with these requisites should alone entitle the party to the benefit of the exception. And this construction is corroborated by the 28th section, where the notification and proof, to be made before the collector, are incorporated into the very terms of the exception.

Nor is it any hardship upon the party, to deprive him of a defence, which he has not chosen originally to set up and establish, and in respect to which he has been guilty of a culpable omission of duty. If, indeed, inevitable accident, necessity or distress, prevent a compliance with the law, or the collector refuse to receive the proofs, the party ought not to be prejudiced, and will be restored to his defence. All, that is required, is good faith and diligence. Nor are the proofs so made before the collector conclusive upon any

party. It is still competent to the *United States* to shew, that the transaction is founded in fraud, and that the accident, necessity and distress, is a mere fiction, ingeniously contrived to cover an illegal traffic. And, on the other hand, it is competent for the claimant, at the trial, to supply any defect of his former proofs, and relieve the cause from every shadow of suspicion. Still, however, the law puts the burthen of proof of the accident, necessity or distress, upon the party, who would avail himself of the defence; and, if he has not complied with the directions of the act, by making the proofs before the collector, and does not satisfactorily explain and excuse the omission, it makes a conclusive presumption against him. The opinion, therefore, of the District Judge, that the jury might acquit upon the ground of unavoidable accident, necessity or distress, although the specific evidence stated in the act was not produced, though, under circumstances, it might be correct, is stated in too broad and unqualified a manner; and this objection of the counsel for the *United States* must therefore prevail.

The second objection seems as well founded. The law presumes, that every public officer does his duty; and therefore it will not impute to him, without evidence, a voluntary and known deviation from it; much less, a connivance in any illegal transactions. But the law does not go farther, and in favour of third persons impute to the collector a knowledge of all the facts attending an importation, of which facts he might be reasonably ignorant; much less, does it impute to him knowledge of a special defence, of which no proofs appear to have been submitted to his inspection. And if the law were otherwise, the mere circumstance, that a collector, acting *bona fide*, in the discharge of his office, believed in the existence of such facts, is no legal proof or presumption of their actual existence

before a court or jury, to whom the question is submitted. The presumption, which the law makes in favour of the good faith and integrity of the collector, is for his own protection; but it can, in no respect, vary the rights of third persons, or change the general rules of evidence applicable to such rights. If the collector be not satisfied of the existence of any unavoidable accident, necessity or distress, his opinion raises no legal presumption against the truth of the defence; nor can it be admitted in evidence for this purpose. And the same rule must equally apply in the converse case. The opinions of third persons are not admissible, to prejudice the rights of parties litigating before judicial tribunals. In the present case, the collector admitted the goods to an entry; and it is, therefore, a fair presumption, that, at the time, he knew of no illegality in the importation. But I cannot yield to the doctrine, that from this entry *alone*, it is to be presumed, that the goods had been unladen from unavoidable accident, necessity or distress, or that the requisite oaths, and proofs thereof, were made before the collector. If it had been shewn, that such a defence had been set up before the collector, and that, after a full knowledge and inquiry, he had admitted the goods to entry, there might have been reason to hold, that the collector was satisfied of that fact; and that the requisite proofs were made before him. Even then his opinion would not be legal evidence of the fact upon the trial of this information. But the opinion of the learned Judge of the District Court does not contain even this qualification. It imputes to the entry *per se* a legal effect as evidence, which does not seem to me properly to belong to the act of any ministerial officer. The collector may have acted innocently, though erroneously, in admitting the goods to entry; and it is more consistent with the facts in evidence, to presume that he acted under a mistake of law, *viz.* that *Or.*

rington, as well as *Castine*, was a foreign port, from which goods might be imported into the *United States*; than to presume that the goods were unladen from unavoidable accident, necessity or distress, when there is no evidence, that such a defence was set up before him. At all events, if the admission to an entry would support both presumptions, the instruction to the jury, which confined it to one, cannot be supported. And upon the more general ground, which has been stated, I am also of opinion that it was erroneous.

We are now led to the third objection, which is to the charge of the Court, that if the goods were landed from unavoidable accident, necessity or distress, and the jury acquitted them on that ground on the second count, they were bound to acquit them also under the fifth and sixth counts. The fifth count is founded on the 50th section of the act of 2d of March, 1799, ch. 128, which provides, that if any goods shall be unladen from any vessel, without a special license or permit, they shall be forfeited. The count alleges, that the goods were unladen and delivered without a special license or permit. The plea contains a negative traverse, *vis.* that the goods were not unladen or delivered without a special license or permit; and concludes to the country; and upon this plea issue was joined. The sixth count is founded on the 92d section of the act of 2d of March, 1799, ch. 128, which provides, that, except in certain districts, no foreign goods shall be brought into the *United States* from any foreign port or place in any other manner, than by sea, &c.; nor shall be landed or unladen at any other port, than is directed by the same act, under the penalty of forfeiture. The count alleges, that the goods were unladen and landed at a port, other than a port directed by the act of Congress. The plea traverses the allegation negatively, *vis.* that the goods were not unladen and

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landed at a port other than a port directed by the said act of Congress; and concludes to the country; and issue is joined thereon.

It is contended on behalf of the claimant, that the plea of unavoidable accident, necessity or distress of weather, is a good defence under every provision of the revenue laws, whether it be specially stated in the public statutes or not; and in support of this argument, the case of *Peisch vs. Ware* ¹⁴ is cited, as directly in point. To the doctrine there stated by the Court, I cordially subscribe, "that it is unquestionably a correct legal principle, that a forfeiture can only be applied to those cases, in which the means, that are prescribed for the prevention of a forfeiture, may be employed." And therefore, it is clear, that where these means cannot be employed from unavoidable accident, necessity or distress of weather, the party is exempted from forfeiture under the 50th s. and 92d s. of the act of 1799. But the difficulty, in the present case, is not in the principle of law, but in its application to the issues between the parties on the fifth and sixth counts. The single point in issue on the fifth count was, whether the goods were unladen without a permit; and on the sixth count, whether they were unladen at a port not authorized by the act of Congress. No question could legally arise under those issues, as to the excuse of unavoidable accident, necessity or distress of weather. The question was, whether the unlivery was in fact made without a permit, or in an unauthorized port, and not whether the omission was excused or justified by accident or necessity. With reference, therefore, to the issues between the parties, the proof of unavoidable accident, necessity or distress, could not legally authorize an acquittal. Such proof was completely *dehors* the record. The opinion of the District Court on this point must there-

fore be overruled. There can be no doubt, that that opinion was delivered upon the general principle of law without reference to the pleadings, to which the attention of the Court below was not probably directed by the counsel at the trial, as indeed it has not been at the argument in this Court. The point of view, in which that opinion has been principally contested here, is in applying the general principle to cases within the 92d section of the act of 1799.

Hitherto, the opinion of the District Court has been considered as referring to an unlading at *Orrington*. But, as the language of it is general, the counsel for the *United States* have argued, that it is too broad, and that the unlading at *Hampden* was equally within the purview of the second, fifth and sixth counts, and especially of the latter; because it is not a port, at which vessels from foreign ports could be admitted to make an entry, nor at which foreign vessels could be admitted to unlade at all. In the view, which has already been taken of this case, it may not be absolutely necessary to decide this point. But, as it has been fully argued, and there are several other causes, in which it is presented, in this Court and the Court below, and a decision is very much pressed, it may not be unfit to decide it. By the act of Congress,¹⁵ *Castine* is declared to be the only port of entry for the district of *Penobscot*, and *Frankfort*, *Bluehill*, *Hampden* and *Deer Island*, are annexed to said district, as ports of delivery only. By the same act,¹⁶ no entry is to be allowed of any vessel from a foreign port elsewhere than at a port of entry, nor any cargo to be unladen elsewhere than at a port of delivery; and none but ships or vessels of the *United States* are admitted to unlade, except at certain specified ports, among which *Hampden* is not enumerated, but *Penobscot* is. Before the act of 1799, the collection of duties was regulated by the

¹⁵ 2 Mar. 1799, ch. 128, s. 2.

¹⁶ Section 18.

act of 4th of August, 1790, ch. 35. Under this last act, *Penobscot* was the port of entry for the district, and was enumerated among the ports, at which foreign vessels might unlade. In the intermediate time, between the passing of these two acts, the township of *Penobscot* was divided by an act of the legislature of *Massachusetts*,¹⁷ into two distinct towns, and the southerly part of it was incorporated by the name of *Castine*, leaving the residue of the old town a corporation under its old name. It is not necessary to decide, whether *Castine*, under these circumstances, was a port, at which foreign vessels might ordinarily unlade; but it is very clear, that if admitted at all, foreign vessels must have made entry at *Castine*, for that was the only port of entry for the district; and could not unlade at *Hampden*, for that was not a port of delivery for this purpose. If, therefore, the case fell within the ordinary rules, an entry at *Hampden* was an illegal act, and a permit to unlade there equally illegal, and of course utterly void. But by the occupation of *Castine* by the enemy, the laws of the *United States* were suspended there, and it was no longer a port of entry for any purpose connected with those laws. Under such circumstances of superiour force, the collector was bound to remove the customhouse to some other convenient place within the district. He was not at liberty to refuse an entry of any vessel entitled to make it, for such vessels had a right to unlade their cargoes at the ports of delivery within the district; and, as the *vis major* prevented the exercise of his authority in the proper place, the doctrine, analogous to that of *cy pres*, applied to the case. Suppose *Castine* had been sunk by an earthquake, and there was a physical, as well as moral, impossibility of making an entry there, could it be pretended that an entry could not be admitted by the collector at any other port in the

¹⁷ Act 10 Feb. 1796.—2 Mass. Spec. Laws.

district? The provisions of the law presuppose a moral, as well as physical, possibility of complying with them; and in this respect are directory to all parties; but if a literal compliance be impracticable from the presence of superiour force, or unavoidable accident, necessity or distress, it stands excused upon the principles of law, as well as the immutable dictates of justice. And the same observations apply to the unlivery at *Hampden*, for if it became indispensable for the preservation of the property, and the proper port was morally inaccessible, whether it was *Penobscot* or *Castine*, or both, such unlivery would stand excused or justified in the same manner. Upon the supposition, therefore, that such an uncontrollable necessity or *vis major* existed, the collector's act, in admitting even a foreign vessel to entry, and to unlivery at *Hampden*, was not an illegalact, but stands completely justified.

If then the instruction of the District Court could be applied to the entry and unlivery at *Hampden*, so far as it stands upon the general principles of law, independent of the pleadings, it might have been difficult to shake it.

The last objection is to that part of the instruction of the Court, which declared certain circumstances, therein enumerated, as constituting a case of unavoidable accident, necessity and distress, within the 27th section of the act of 1799, ch. 128. The circumstances enumerated are 1. The encouragement held out to importations in neutral vessels by the President's proclamation, and the repeal of the non-importation acts. 2. The blockade by the enemy of all the ports in the eastern country; and 3. The actual military occupation by the enemy of the only port of entry in the district, whereby the approach of neutral vessels to the ports in that section of the country was rendered extremely hazardous, if not actually impracticable. As I understand the charge, and as it was understood at the argument

by the counsel, the learned judge considered these circumstances as constituting *per se* a case of unavoidable accident, necessity and distress, within the statute, and entitling the goods to an acquittal upon the second, fourth, fifth and sixth counts. For the reasons, which have been already stated in reference to the pleadings, this direction cannot be supported, as to the fourth, fifth and sixth counts; for no question, as to such accident, necessity or distress, was in issue between the parties. It remains, therefore, to be considered with reference to the pleadings on the second count.

It has been urged on behalf of the *United States*, that the only excuse, admitted by the statute, is of marine accidents, or necessities occasioned by stress of weather. But the words of the statute do not admit or require this narrow interpretation. They apply to any unavoidable accident or necessity, arising from any other cause, as well as from distress of weather. And there can be no doubt, that a capture by an enemy is an unavoidable accident or necessity, *casus fortuitus*, within the purview of the clause. And an unlivery, occasioned by an actual capture, or an imminent and pressing danger of immediate capture, which left no time or opportunity to obtain authority from the proper officers, would be just as good a justification, as if it were occasioned by a tempest or a shipwreck. But it is not sufficient to constitute a case of unlivery by unavoidable accident, necessity or distress, that there is danger of a capture or a tempest. The danger must be immediate, and operating directly on the subject matter. The peril must be so instant and pressing as to leave no hope of escape, or of preserving the property by ordinary means, or by delay for the ordinary authority; for in no other case, can it be considered as unavoidable. And there is great force in the argument of the counsel for the *United States*, that the accident, necessity or distress, intended by the 27th section of the statute,

is such as renders it indispensable to unlade the goods immediately, and not merely such, as renders it hazardous or impracticable to carry the goods to their port of destination. In short, that it must be an accident, necessity or distress, affecting the *condition* of the ship or goods, and not the *voyage* merely; for, in the latter case, the unlivery may still be duly authorized by the proper officer of the customs. What is it, that the accident, necessity or distress excuses? Not the proceeding on the voyage, for that the party may always legally abandon; not the unlivery merely, but the unlivery without being duly authorized by the proper officers of the customs. If, therefore, there be time and opportunity to procure such authority, and it is not done, the party cannot shelter himself behind this section of the statute. Now it seems to me, that neither the blockade of the eastern ports, nor the military possession of *Castine*, were of themselves perils operating directly and immediately upon the goods in this case, so as to present an immediate necessity for their unlivery, without being authorized by the proper officer of the customs. There might have been danger of capture by delay, but it was remote; and the excuse, *quia timet*, is not such an excuse, as is contemplated in the statute. The blockade of the coast, and the military possession of *Castine*, might, with other pressing circumstances of accident or injury, have combined to form a case within the statute, but of themselves they could not constitute one. These could not but be known to be the ordinary perils of the voyage, and would, of themselves, no more justify or excuse an unlivery of the goods at one place, than at another. And the policy of the law would be completely defeated, if, after an arrival within the limits of the *United States*, goods could be unladen without proper authority, because they might be otherwise exposed to cap-

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ture by the enemy, when no instant and pressing necessity existed, to prevent an application for such authority.

In the present case too, there seems less reason for the application of the principle; for, as the goods were brought from *Halifax* in a manner wholly unexplained in the evidence, the presumption of the danger of capture was not so great as in ordinary cases, and the case was left open to the suggestion, stated by counsel, that they might have been imported under the protection, or by the connivance of the enemy. However, I lay no stress on this suggestion, but for the other reasons, which have been previously urged, I feel myself compelled to overrule the opinion of the District Court upon this point.

Upon the whole, the judgment of the District Court must be reversed, and a new trial had at the bar of this Court.

Blake and Richardson, for the *United States*.

Prescott and Hubbard, for the claimant.

THE MARGARETTA AND CARGO, GLOVER, &c. CLAIMANTS.

The Secretary of the Treasury has no power to remit penalties, unless in cases provided for by law. If he recites his authority under a special act, and remits in pursuance of that act, the remission, if unsupported by such act, cannot be supported under the general act of 3d of March 1797, ch. 67.

Under the act of 27th of February, 1813, ch. 175, the Secretary of the Treasury had no authority to remit the penalties for goods *subsequently* imported, contrary to the non-importation acts.

Under the act of 3d of March, 1797, ch. 67, the District Judge is bound, upon a petition for remission, to state the facts, and not merely the evidence of the facts; and the Secretary of the Treasury is bound by this statement of facts, and cannot legally act upon any other evidence. The District Judge, in stating such facts, acts judicially, and the proof before him must be made by *competent*, as well as by *credible* testimony. A statement by the District Judge, that the claimant only swore to the facts before him, is no legal proof under the act of 1797, upon which the Secretary of the Treasury is authorized to remit.

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Under the act of 27th of February, 1813, ch. 175, the Secretary of the Treasury had no authority to make a remission of *part only* of the property forfeited. If he remitted, at all, he was bound to remit the whole penalty or forfeiture.

Neither under the act of 1797, nor the act of 1813, had the Secretary of the Treasury any authority to remit the collector's share of the forfeiture, nor any part of it, *ex nomine*.

Until final judgment, no part of the forfeiture vests absolutely in the collector; but, after final judgment, his share vests absolutely, and cannot be remitted.

THIS was an appeal from the District Court of *Maine* in a proceeding upon an information *in rem* on the instance side of that court. The information contained two counts. The first, which is the only one now necessary to be considered, charged that the cargo, consisting of prohibited goods, was, on the third of September, 1813, imported into the *United States* from *New Brunswick*, contrary to the non-importation acts. There was no question, that the vessel and cargo were liable to forfeiture under these acts. Pending the proceedings in the court below, the claimants, *Stephen Glover* and *Charles Tappan*, procured a remission from the Secretary of the Treasury, in consequence whereof the learned judge of that court decreed condemnation of nine sixteenths of the goods claimed by them and restoration of the remaining seven sixteenths. From so much of the decree, as restored the seven sixteenths, the *United States* appealed to this Court; and the sole question was as to the legal sufficiency of these remissions. They were both in the same form, and that to *Glover* was as follows—"TO ALL TO WHOM THESE PRESENTS SHALL COME, I *George W. Campbell*, Secretary, &c. SEND GREETING—Whereas a statement of facts, bearing date the 24th of February, 1814, with the petition of *Stephen Glover* thereto annexed, touching certain forfeitures and penalties incurred under the statute of the *United States*, entitled "an act to interdict the commercial intercourse between the *United States* and *Great Britain*

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and *France*, and their dependencies, and for other purposes" has been transmitted to the Secretary of the Treasury by the judge of the *United States* for the District of *Maine*, pursuant to the statute of the *United States* entitled, "an act directing the Secretary of the Treasury to remit certain fines, penalties and forfeitures therein mentioned," as by the said statement of facts and petition remaining in the Treasury department of the *United States* may fully appear; and whereas, I, the said Secretary of the Treasury, have maturely considered the said statement of facts and petition—NOW THEREFORE KNOW YE, that I, the said Secretary of the Treasury, in consideration of the premises, and by virtue of the power and authority to me given by the said last mentioned statute, do hereby decide to remit to the said petitioners, the right, claim and demand of the collector only to the said forfeitures and penalties, except one eighth part thereof, on payment of costs and of the duties on the part remitted. Given under my hand and seal, &c. the 29th day of July, A.D. 1814." The summary statement of facts here alluded to consisted solely of the petition of the claimant attested on oath, and the following certificate of the District Judge, "District of *Maine*, February 24, A.D. 1814. Upon a summary examination now had upon this petition, in the presence of the Attorney, *Lee*, and the collector of *Bath*, the only evidence offered to support the facts stated in it is the deposition of the petitioner, taken before *William Stevenson*, a notary public and justice of the peace for the County of *Suffolk*, hereunto annexed."

The cause was argued, at this term, by *G. Blake*, and *Preble* for the *United States*, and *Prescott* and *Kinsman* for the claimants.

STORY, J. delivered the opinion of the Court. The points involved in this discussion are of peculiar delicacy and embarrassment, in as much as they embrace considerations of the legal power and duties of one of the high officers of the government. It is not the duty of this Court, and certainly it is not its inclination, to pry into the conduct of high executive officers with a jealous and scrutinizing eye. The Court is, on the contrary, disposed to exercise towards them every liberality not inconsistent with the principles of law. Let it, however, be recollected, that ours is a government of laws and not of men ; and that consequently every act of every officer, of the highest, as well as of every inferior grade, must be tried by the test of the law, and stand or fall, as that has dictated. The power to remit penalties and forfeitures is one of the most important and extensive powers, which can be exercised under the government. It vitally affects the rights, the revenues, and the prerogatives of the *United States*. These cannot be waived, or extinguished, except in the cases and by the persons provided by law. The party, therefore, who sets up a treasury pardon, to purge away a forfeiture, must shew that such pardon is within the purview of the powers confided to that department.

I do not say, that every thing is to be proved to be done with the precision and accuracy of special pleading, or that a rigid adherence to forms is to be exacted. But there must be a substantial compliance with the requisites of the law ; and if, after every reasonable allowance, this cannot be found, the pardon must be adjudged to be inoperative.

I have come with these impressions to the consideration of this cause, and shall now proceed to examine the points, which have been made, with all the respect

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due to the talents and integrity of the late Secretary of the Treasury, and with all that firmness, which befits the station, I have the honour to occupy.

The counsel for the *United States* have introduced their argument with two propositions, which cannot well, upon legal principles, be doubted. The first is, that the power of the Secretary of the Treasury to remit penalties and forfeitures can be exercised only in the cases prescribed by law ; and the second, that where he recites that the remission is granted by virtue of a *special* authority granted by a *special* statute, he cannot be presumed to have acted under any general authority granted by any *general* statute. The latter position has indeed been questioned at the bar ; but I have not been able to perceive in what manner it has been, or can be, impugned. To adopt a contrary doctrine, would be to presume a fact, of which there is no evidence, against the express written declarations of the party ; and might often lead to the most mischievous consequences. The present case affords an illustration of the propriety of the position. By the general act authorizing remissions,¹ the Secretary of the Treasury can remit penalties and forfeitures, only when in his opinion the same shall have been incurred without wilful negligence or any intention of fraud. And, in my judgment, the argument is perfectly correct, that sufficient matter must be stated in a remission under this act, to shew that the case is within its purview. It is a special authority, to be exercised only in given cases, and it must be shewn on the face of the pardon, that *in the opinion* of the Secretary, there has been no wilful negligence or intention of fraud ; and such indeed has been the uniform practice under the statute. But it has never been considered, that it

¹ *March 3, 1797, ch. 67.*

was compulsive upon the Secretary to exercise this power ; on the other hand, it has ever been deemed a subject submitted to his sound discretion. Very different is the statute,² under which the Secretary purports, in this case, to have acted. It is *mandatory* to the Secretary to remit the penalties and forfeitures, where the facts of the cases are brought within the statute. If he is satisfied of the existence of such facts, he has no farther discretion, but is bound to remit. The facts too required to be proved under this statute are very different from those under the statute of 1797. It is not necessary to be shewn, that there was no wilful negligence or intention of fraud. The only facts to be proved are, that the goods seized were *bona fide* American property, at the time of their importation ; that they were not clandestinely imported or introduced, and that they were imported or introduced since the declaration of war. There are other material differences in the powers given by these statutes, which might authorize and require a remission under the one, which could not be authorized or required under the other. To presume, therefore, an exercise of authority under the general statute, when it is recited to be under the special statute, would not only be a presumption against the fact, but a presumption in some cases, which would involve a violation of law.

The first objection to this treasury remission is, that it was made without any statement of facts, or competent evidence, according to the provisions of the statute, under which it purports to be granted. That statute requires the party to petition for relief to the judge proper to hear the same in pursuance of the act of 1797 ; and the facts shewn on the inquiry before the said judge are to be stated and transmitted, as by the same act is required, to the Secretary of the Treasury. Nothing can be clearer, than that, by

² Feb. 27, 1813, ch. 175.

the act of 1797, the judge must state the *facts*, not merely the *evidence* of the *facts*, which appear upon the summary inquiry before him; and it is upon this statement of the facts, *and this only*, that the Secretary is authorized to proceed. In the performance of this duty, the judge exercises judicial functions, and is bound by the same rules of evidence, as in other cases. The proof, therefore, of the facts must be by *competent*, as well as *credible* testimony; and he is to transmit a statement of the *facts*, as they judicially appear before him, and not the *evidence*, from which he draws a legal conclusion, as to the existence of those facts. Such a statement of facts is in the nature of a special verdict, or an agreed case; and, as there is no appeal allowed by law, it is not competent for any other tribunal collaterally to call in question the competency of the evidence, or the regularity of the proceedings, which preceded such statement. It is conclusive upon all the parties. In the present case, however, there was no such statement of facts. The only evidence offered, to support the petition, was the oath of the party, which was manifestly incompetent in itself, and appears not to have been taken before the District Judge. The learned judge does not pretend to give any opinion, as to its competency or credibility, or to certify any facts relative to the subject matter of the petition. The whole proceeding was as pure a nullity, as can well be imagined. The question then comes to this; whether the Secretary of the Treasury can remit, where no statement of facts has ever been transmitted to him? It is conceived, that but one answer can be given to the question, *viz.* that he cannot. If, notwithstanding, he should so do, it would deserve great consideration, whether it ought not to be held void, as having issued by mistake, or upon false suggestions. Upon this point, however, I beg leave to reserve a decision, until it shall be necessary in judgment. To guard,

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however, against misapprehension, it is proper to add, that where such statement of facts is transmitted, the opinion of the Secretary, as to their sufficiency to bring the case within the statute, is conclusive, and cannot be overhated in any collateral inquiry.

The next objection is, that the Secretary had no authority, under the act of 1813, to remit the forfeiture upon a part only of the goods ; nor, under any statute, to remit the collector's share, *eo nomine*. By the act of 1797, the Secretary is authorized to remit "upon such terms, or conditions, as he may deem reasonable and just," the whole or any part of any forfeiture within the purview of that act. And the same power is expressly given, as to all cases within the non-importation act.³ The forfeitures under this last act are to be distributed in the same manner, as those under the collection act of 1799, ch. 128, which in general gives⁴ to the collector and naval officer, and surveyor, if any there be, a moiety of the seizures made within the revenue district. But until, final judgment or decree no absolute title vests in the collector. His right is merely inchoate, and when it is consummated by a final judgment, it becomes an indefeasible right. If, pending the proceedings, a remission be made of the whole property forfeited, his whole title is gone ; if of a part only, his right attaches to the remainder, and by a judgment of condemnation becomes fixed and indissoluble. It is not therefore competent for the Secretary to remit *eo nomine* the collector's share ; for the law has expressly given him a moiety of all forfeitures recovered, and whatever may be the portion recovered, his right to the moiety thereof attaches. It is only by a remission of the whole forfeiture, that the collector's share can be wholly defeated ; and then it takes place by the mere

³ March 1, 1809, ch. 91, s. 18, &c.

⁴ Sec. 91.

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operation of law. Under the acts of 1797, and 1809, therefore, this special remission could not be supported. And the other part of the objection seems equally well founded. The act of 1813, ch. 175, contains no provision authorizing a partial remission. It is directory to the Secretary to remit *all* forfeitures within that statute, upon the simple condition of payment of the costs, charges and duties. It was not competent, therefore, for him to interpose any limitation or condition, beyond that which the law had expressed.

Another objection, which rides over all the others, is, that under the act of 27th of February, 1813, upon which the remission purports to proceed, the Secretary had no authority whatsoever to grant the remission. This objection, if true, is in every possible view fatal. The importation in the present case is conceded on all sides to have been made in September, 1813, at least six months after the passage of the act. If therefore it be not prospective in its operation, it is very clear that the remission is utterly void. It seems to me, that upon no reasonable construction, consistent with the apparent intent or language of the statute, can it be deemed to apply to future cases. It speaks of goods, which had then been imported into the *United States*, and of penalties, which had then been incurred; and directs the Secretary to remit such forfeitures, if it should be proved to his satisfaction, that the goods, at the time of their importation, *were* (not, *should be*) American property, and *were not* (not, *should not be*) clandestinely imported or introduced, and that they *were* (not, *should be*) imported since the declaration of war. The language, therefore, obviously points to cases already past; and directs the prosecutions, *if any shall have been* (not, *shall be*) instituted, to be dismissed. The only words of the statute, on which to

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hang a doubt, are the words, which give the benefit of the act to goods, "which were shipped from the said Kingdom (i. e. of *Great Britain and Ireland*) prior to the second of February, A. D. 1811." But these words are evidently used with reference to goods already imported, and which had already incurred a forfeiture, and must be explained by reference to a preceding act. The act of the 2d of January, 1813, ch. 149, directed the Secretary to remit the forfeiture upon all goods, which had been imported from the Kingdom of *Great Britain and Ireland*, and were shipped on board of vessels, which departed therefrom between the 23d of June, and the 15th of September, 1812. This act afforded a very limited relief, for there were many shipments made to ports in *Nova Scotia*, and other British colonies, with a view to be imported into the *United States* upon the repeal of the non-importation act, and which, since the war, had come directly from thence into the *United States*. The act of the 27th of February, 1813, was designed to reach this very large class of cases. It is not, like the act of the 2d of January, 1813, limited to importations direct from the *United Kingdom*, but to cases, "where goods, &c. have been imported or introduced into the *United States* from the dependencies of the *United Kingdom*, &c. since the declaration of war by the *United States* against the said Kingdom, or which were shipped from said Kingdom prior to the 2d of February, A. D. 1811."—If the sentence had stopped here, there might have been some foundation for the argument, that this last clause might apply to future importations of goods so shipped. But it is immediately added, "whereby the person or persons interested in such goods, &c. or concerned in the importation or introduction thereof, hath or have incurred any fine, penalty or forfeiture, &c." Now no fine, penalty or

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forfeiture, could by law have been incurred, under the non-importation act, by any shipment of goods from *Great Britain* prior to the 2d of February, 1811, unless they had been subsequently imported into the *United States*; for that act was not in force until after that day. It is plain, therefore, that the Legislature, in this clause, meant to speak of goods, which had not only been shipped, but had been actually imported into the *United States*. Whether the word "or" is to be construed, as here used for the connective "and," and so operate as a qualification upon the preceding description of goods, or whether it is to be construed as a disjunctive, and so refer to goods not only imported from the British dependencies, but also from other places, if shipped before the 2d of February, 1811, is not now material to consider. It is sufficient, that the words, in their connexion, refer to importations already made, and that it is impracticable, in any other manner, to reconcile the other provisions of the statute. The consequence is, that the present importation was not within the purview of the statute, and the remission was made without competent authority.

Upon the whole, in every view of this subject, I am entirely satisfied that the remission is void and ineffectual. I cannot but regret, that it has fallen to my lot to pronounce this unwelcome sentence; but it is pressed upon me by duties, from which I am not at liberty to shrink, and which, I trust, I am incapable of betraying.

Let the decree of the District Court be reversed, and the property be condemned to be distributed according to law.

Condemned.

Note. This case was carried by appeal to the Supreme Court, and afterwards the appeal was abandoned upon a compromise between the parties.

THE BRUTUS, AUSTIN COMMANDER.

By the shipping articles of a privateer, it was agreed that the privateer should cruise, where the owners should direct, and that three fifths of the prizes taken during the cruise should belong to the owners, and two fifths to the crew; and that the officers and crew should repair on board immediately when ordered, and should remain for three months from the time of sailing, unless the cruise was sooner completed in the opinion of the owners. The privateer sailed on the cruise, and was compelled to go into *France* for repairs, in consequence of injuries received in an engagement, and by stress of weather. While in *France* the three months elapsed, and the crew refused to remain by the ship, unless new articles were signed for a second cruise. On the homeward voyage, after the new articles were signed, captures were made. It was held, that the cruise was not legally broken up in *France*, and that the assignees of shares on the original cruise, and the officers and crew, who were put on board of prizes captured on the outward voyage, were entitled to share in the prizes made after the departure from *France*.

A cruise, *ex vi termini*, imports a definite place, as well as time of commencement and termination, unless that construction be repelled by the context. When it is not otherwise specially agreed, a cruise begins and ends in the country, to which the ship belongs, and from which she derives her commission.

A cruise for three months means, that three months only shall be employed in cruising, and not that the engagement for the cruise is then, to all intents and purposes, to terminate.

A cruise, like a voyage, begins in legal contemplation, when the ship breaks ground for the purpose of sailing.

When the term of time once begins to run, it is not suspended by any intermediate accident or casualty happening in the course of the cruise.

THE material facts in this case were as follows: the private armed schooner *Brutus*, *William Austin* commander, being fitted for a cruise; about the third of October, 1814, shipping articles were entered into by and between the owners, and the commander, officers and crew of the privateer, among which were the following stipulations: "1. The schooner shall cruise, where the owners, or a majority of them, may direct. 2. Three fifths of the net proceeds of all the prizes and prize goods, taken during the cruise, are to belong to the owners; the other two

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fifths to belong to the captain, officers and crew, and to be divided among them according to the number of shares set against their names. 3. No one of the company shall, before the end of the cruise, sell more than half his shares. 4. *The captain, officers and crew, agree to repair on board immediately, when ordered, and to remain for three months from the time of sailing, unless the cruise is sooner completed in the opinion of the owners.*" The privateer sailed from *Boston* on the cruise, on the first day of November, 1814, and was, on the same day, chased by the enemy's ships into *Salem*, from which port she sailed again on the cruise on the eighth day of the same month. Several prizes were made and manned out, and at length the privateer, having been considerably injured in her spars and rigging by violent gales of wind, and by damage sustained in an action with an enemy's ship, which was captured, was compelled to put into *Quimper* in *France* for repairs, and arrived there on the first day of January, 1815. Notwithstanding every exertion was made, the necessary repairs were not completed until the fifth day of February following. In the mean time, the crew gave notice to the captain, that their term of service would expire on the first day of February, and that they should not hold themselves bound to remain after that day, unless a new engagement was made for a second cruise. The captain made application to the American consul at that port, on this subject, and was informed that the crew could not be retained under the articles. In consequence of these circumstances, the captain was induced, on the 26th of January, to put an end to the first cruise, and to make and execute shipping articles for a second cruise of three months from the time of sailing from the river of *Quimper*, unless the cruise should be sooner abandoned by the commander. The whole of the crew then on board, excepting two offi-

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cers, signed the new articles; and one new officer and fifteen other men were shipped, to make up the proper complement. The privateer sailed from *Quimper* on the second cruise, and in the course of it, captured two valuable prizes, (the last capture having been made on the second day of March, 1815,) and afterwards safely arrived in the *United States*. The captain of the *Brutus*, previous to his sailing from *Boston*, received orders from the owners respecting the places, where he was to cruise, and authorizing him to exercise his own judgment in respect to it, after consulting his officers. He was farther authorized, in case he went to *France*, and should think it proper to break up the cruise there, to convert the *Brutus* into a letter of marque, and bring home a cargo to the *United States*. He did not, however, act at all under this last instruction.

The present was a supplemental libel, filed by the libellants, to compel a distribution of the proceeds of the prizes made in the second cruise, which proceeds were, at the time of filing the same libel, in the registry of the District Court. The libellant, *Woodberry*, was a prize-master on board of one of the prizes, made by the *Brutus* on her first cruise, with which he safely arrived in the *United States* about the 7th day of February, 1815, and was utterly unable again to rejoin the privateer. The other libellants were assignees of the shares of some of the original crew under assignments executed at *Boston*, before the sailing of the *Brutus* on the cruise. These assignments were substantially alike, and granted the share, "of all the monies, goods, merchandises, effects and proceeds whatever, which may be lawfully captured, seized or recaptured by the private armed vessel or schooner, called the *Brutus*, *William Austin* commander, during the cruise, on which she is now bound, &c." and they contained an irrevocable letter of attorney respecting the premises.

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The cause was argued by *Prescott* and *Garrison* for the libellants, and by *Dexter* and *J. T. Austin* for the respondents.

Garrison. Were the captures, made by the *Brutus* after sailing from *France*, made during the cruise, on which she was bound at the time of executing the instruments of assignment?

The cruise continued until the return of the vessel to the *United States*, unless it was sooner terminated, either by the owners, or some one having authority from them; or by some original limitation. It is not pretended, that the owners, by any act of theirs, interrupted the cruise. Had then the commander authority to terminate it, derived from his instructions, or from his office as commander?

The instructions, it is evident, gave him no authority to terminate the first cruise, for the purpose of commencing a second.

His general power as commander could not extend to such an act, because 1. He is one of the parties contracted with by the owners in the first articles, and could not, of course, release himself from the obligation of those articles. He, therefore, at least, continued to sail under the first contract. 2. To suppose such an authority in him, is to suppose him to have the power of making an agreement, binding on the owners, by which they should receive but one tenth, or any smaller share, instead of three fifths of the prizes. 3. A commander has authority to ship new sailors, and even an entire new crew, if necessary, but not to undertake a new cruise or voyage without express instructions. 4. If he had authority to commence a new cruise in *France*, he might have done the same at sea.

The owners, therefore, not having assented to the second contract, it was void. The case is analogous to that of partnerships prolonged beyond the stipulated time.¹

¹ *Watson on Partnership*, 381.—2 *Dall.* 39, *Keane vs. The Gloucester*.

2. Did the original cruise expire in *France* in consequence of the fourth article in the contract, under which it was commenced?

The true construction of this clause is, not to fix a period to the cruise, which in its nature is not susceptible of so exact a definition of time; but to avoid an inconvenience, which had sometimes been experienced, by giving to the owners an option, in case of the vessel's return within three months, either to send her abroad again, or then to terminate the cruise. The contract of the seamen must be understood to be; "to serve three months, at least, if required; and till the end of the cruise;" and it was probably intended, that the return should be as soon as convenient, after three months. Any other construction would lead to absurd consequences, equally inconvenient to the seamen and to the commander.

But admitting the respondents' construction to be correct, and that the cruise, or time of service, is limited to three months; still, it is contended, the prescribed time had not expired on the fifth of February, when the *Brutus* sailed from *Quimper*, nor even on the second of March, when she captured her last prize. For the time spent in *France*, in necessary refitting, is not to be accounted a part of the three months. It was a suspension of the cruise arising from inevitable accident. Very little can be found in English books upon this subject, but in the French code the rule is distinctly laid down.²

² Declaration of the 1st of March, 1781, art. 21.

"Les engagements pour la course ordinaire, s'il n'y a pas de convention contraire, y compris le temps des relaches, seront de quatre mois, à compter du jour que le vaisseau mettra à la voile, et doublera les caps ou pointes, qui, suivant les usages locaux, déterminent un départ absolu; Exceptons toutefois les relaches nécessaires pour amener des prises, prendre des vivres, faire de l'eau, espalmer, ou d'autres cas pressans; à la charge de remettre en mer aussi-tot que le vent le permettra." — 2 Code des Prises, 920.

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Reason, as well as the authority of the French law, will lead us to conclude, that if any limitation was intended, it must have been *three months of effective cruising*.

It may farther be contended on behalf of the assignees, that they ought not to be affected by any provision in the contract between the seamen and the owners. Of the contents of this contract they might have been, and probably were, ignorant. They would necessarily understand the word "cruise" in its popular sense, as extending to the return of the vessel to the *United States*.

With regard to the prize crews, it would be peculiarly hard and inequitable, that they should be excluded from a share in the only valuable captures made during the expedition, because they happened to be detached from the ship on a service, which was for the common benefit.³

J. T. Austin, for the respondents. The prize master did not, actually or constructively, belong to the *Brutus*, at the time when the captures were made. The cruise, upon which she was then sailing, was not the same with that, for which he had shipped. By the prize act,⁴ the owners, officers and crew of the privateer may make such contract, as they please, for the division of prizes and the continuance of the cruise, and there is nothing to restrict them from expressly agreeing to terminate the enterprise in a foreign port. In the present case, the parties have entered into a written contract, by which they have engaged, not for an indefinite cruise, nor for one limited by place, but for a

This is substantially a re-enactment of the ancient ordinance of Nov. 25, 1693, art. 5.—1 *Code des Prises*, 147. But the old ordinance allowed only fifteen days for any stop to procure provisions, &c.—See also 2 *Vol.* 231.—2 *Code des Prises*, 641.—2 *Vol.* *des Prises*, 38.—2 *Emer. des Assur.* 10.

³ 6 Rob. R. 213. *The Frederic and Mary-Ann*.

⁴ Stat. 26 June, 1812, 11 U. S. L. 233.

service defined and limited by time. In what manner such a service is to be understood appears from the case of *Syere vs. Bridge*.⁵

It is not denied, that the commander terminated the cruise in *France*, if he had power so to do, and if his authority was reasonably exercised. His power is not questioned by the owners, who, indeed, have ratified his conduct. It cannot therefore be questioned by the other officers and the crew. The facts shew, that the authority was reasonably exercised. The commander used every exertion to fit his vessel for sea before the time expired. He could not accomplish it, and he would have been abandoned by his crew, if he had not made the contract for the new cruise.

It is not material to the present question, whether the commander has power to commence a new cruise, or not. The only question is, whether the first cruise had expired. There was, however, a new cruise, with a crew different from that, which had been employed in the first.

Had the *Brutus* returned to the *United States*, and sailed again, immediately after the expiration of the three months, with the same crew; it is not pretended that the men, who were on board of prizes, or in prison in the enemy's country, would have been entitled to share in the proceeds of prizes taken after such second sailing. Yet the hardship would not have been less in that case, than in this.

As to the assignees, the only question is, to what benefit were the assignors entitled under the first contract? They have assigned only their earnings for three months.

Dexter, on the same side. The claims of assignees are not deserving of any favourable regard. In general, for a

⁵ *Doug.* 530.

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very trifling consideration, they seek to share in advantages procured by the labours and dangers of others, and to reap the harvest, which was sown without their care. In the present case, there are many circumstances, independent of the written contract, to oppose their pretensions. But that contract will, it is believed, be found conclusive.

1. The argument on the other side has proceeded on the supposition, that the engagement in this case was for a cruise. But the undertaking is, not, to *cruise for three months*; it is, to *continue on board* for that time, which can leave no doubt as to the intention. A portion of the time spent, it is said, ought not to be accounted a part of the limited period. But why not, we may ask, when the contract is, "to continue on board" three months? What difference can it make, whether the ship be in port or not?

When did the three months commence? Certainly, when the men were ordered on board in *Boston*. In a case of insurance, this voyage would undoubtedly be considered to commence at the moment of breaking ground.

The whole object of the foreign ordinance, which has been read, is to fix limits to an uncertain and indefinite contract. It cannot apply to a case, where there is an express agreement. The case from *Douglas* shews, that Lord *Manfield* considered a cruise for a specified time, as limited to the precise time agreed on.

2. The contract is not absolute even for three months. The owners had power to terminate it within that period. Now a great variety of events may happen, in which the exercise of this discretion by the owners would be expedient, or even necessary. It is not to be supposed, that in all cases they are to decide in person. Circumstances, requiring their interposition, are more likely to take place abroad, than in a port of the *United States*. The commander, therefore, as their agent, must determine, when it becomes

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expedient to break up the cruise. There is no question here, that the commander acted reasonably, if he had the power; and having, without fraud or corruption, declared the contingency to have happened, which was to terminate the first cruise, it ceases to be of any consequence, whether the second cruise was lawfully commenced or not. I should, however, rely, with much confidence, on the instructions, as giving to the commander a discretion broad enough for this purpose.

There is no reason to apprehend the mischiefs, which have been supposed to flow from our construction of the contract. The law would imply an obligation, independent of all stipulations, which would save the property from being abandoned to destruction in cases of extreme peril. In the present case, it is certain, that no danger existed.

Prescott, in reply: Two distinct classes of claims are asserted in the libel now before the Court, that of the prize-master, and those of the assignees of prize shares. In general, however, the same reasoning will apply to both.

The first question is, what is assigned? To ascertain the meaning and extent of the language used in the instruments of assignment, we must resort to our knowledge of the common mode of transacting similar business. The assignees must have supposed themselves purchasing a right in a *cruise* from the *United States*, in the sense in which that term is generally understood. There was no copy of the articles in the hands of the seamen, and without notice of some special clause, there was no reason for the assignees to wish an inspection of those articles. Was it possible they should suppose, that this vessel would go to a foreign country, at a time when all countries, but our own, were at peace with *Great Britain*, there to disband one hundred seamen, and to refit for another cruise?

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But, it is said that the cruise was actually terminated in *France*. This point is material, because no new cruise could be undertaken until the first was properly ended. It is argued, that a new cruise was commenced, because the seamen shipped anew after the expiration of their first contract. But how was the first contract dissolved? Was it competent for the commander, one of the parties to that contract, to put an end to its obligation without the concurrence of the owners, whose interests were distinct, and might be so materially affected? It is not necessary to spend much time in considering, whether, as commander of the privateer, he had authority to break up the cruise, and to commence a new one. No such power is ever considered to belong to the master of a merchant vessel. It would expose the owners to the loss of the whole expense of out-fits; and they would have no security, that by the new contract, which the commander might make in a foreign port, their share in the prize proceeds would not be materially reduced.

Had he then any such authority from his instructions? Nothing can be more improbable, than that the owners should give such a power, nor are their words to be so construed, unless the inference be necessary and direct. Upon looking into the instructions, we find, that so far from this, the commander is directed, if he should think it for the owners' interest, "to *give out* that he is a letter of marque, &c." and "to favour this idea by taking on board goods." No power is given to break up the cruise in fact, or to convert the vessel into a letter of marque. Some reliance has been placed on a clause directing the commander, in cases of doubt, to consult with his officers, and then to act, as he may think best; but it cannot be supposed, that by this it was intended, that he should consult them concerning subjects, in which they had a direct interest contrary to that of the owners.

It is contended, that whether the commander had such power or not, yet the contract expired by its own limitation at the end of three months, and the men had then a right to leave the ship. This, if true, could not alter the rights of the assignees, supposing the fair import of the word "cruise" to comprehend both the outward and homeward voyage, for the *cruise* is not necessarily commensurate with the term of service.

But the articles will not admit such a construction. There is no stipulation, that the crew shall be discharged at the end of the time. They engage to serve three months, unless the cruise is sooner completed in the opinion of the owners. This shews an expectation, that the cruise was to end in the *United States*. The construction, therefore, must be, that they were to serve three months if required, and until the end of the cruise. It is said, they bind themselves only to "remain on board" so long; but are they not to remain for the purpose of cruising? In construing the contract, its object must be taken into view. The vessel was to go into the *Atlantic*, and on the coast of *Europe*. If the time should expire while she was at sea, were all the obligations of the contract at once to cease? Were the crew released from the command of their officers? Had the commander a right to put the crew on shore, in any place he might think proper? The clause was probably intended to fix generally the duration of the cruise. At the end of the time, the crew might insist upon returning, but they must continue to serve until arriving in the *United States*, and if a prize should be taken on the passage homeward, it would be distributed according to the articles.

But the three months had not expired at the time when the captures were made. The rule of the French law, as the rule of a great commercial country, is entitled to much respect. The ordinance limits the duration of the cruise to

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four months, in the absence of any express limitation, and this limitation is as effectual as if made by the contract. Yet the time spent in port is excepted out of the limited time. This is reasonable and just, for the owners are liable to great expenses, which continue while the vessel is in port; and for these their only compensation is the chance of making captures. If the time of service should be considered as expiring in a foreign port, the whole benefit of the expedition might be lost.

STORY, J. This cause has been argued with great ability on both sides. The questions involved in it are of considerable difficulty, and it is to be regretted, that so little light can be gleaned from authorities, to assist in the decision, which is now to be pronounced.

We are called upon, in the first instance, to put a construction upon the shipping articles. These, like all other mercantile instruments, are drawn up in a very lax and artificial manner. To construe the language by the technical rules of literal interpretation would be to defeat the manifest intention of the parties. We are, therefore, bound to construe it with great liberality, and to look to the general scope and object of the instrument, rather than to weigh minutely the force of detached expressions. "In conventionibus, contrahentium voluntatem, potius quam verba, spectari placuit." *

It is argued, in behalf of the respondents, 1. That this was an engagement for a marine service limited solely by time; and that it was not even an engagement to cruise for three months, but simply to remain on board the ship three months. 2. That if it should be construed to be an engagement for a cruise, it was a cruise not measured by place, but simply by time; and that "cruise" *ex vi termini* im-

* 3 Poth. Pandects. 825.

ports the period of time, during which a vessel is engaged on the ocean, for the purpose of making captures, without any return into port.

To support the first position, great stress is laid on the stipulation of the officers and crew to repair on board, "and to remain for three months from the time of sailing, unless the cruise is sooner completed in the opinion of the owners."—But it is manifest, that the parties understood the engagement to be for the purposes of cruising. The prizes captured, "during the cruise" were to be divided in a certain ratio among the crew; and this certainly refers to prizes made during the term of service of the crew. "The cruise" might be determined by the owners before the expiration of the three months; and how could this be, if the parties had not engaged for "a cruise"? Besides, if we were to adhere to a literal construction of these words, it would lead to the most singular incongruities. If it were a sufficient compliance with the stipulation "to remain" on board, how were the ordinary or extraordinary duties of cruisers to be performed? How were prizes to be captured and manned out and navigated into port? So far, indeed, from its being the intention, that all the crew should "remain" on board, during the stipulated term, it was in the obvious contemplation of the parties, that a part were to leave the privateer and man prizes. For what other purpose could there be prize-masters on board? I cannot, therefore, but construe the contract to be for a cruise of three months, commencing from the departure of the privateer from the port of equipment; and such an engagement includes a liberty to cruise during the whole stipulated term.

And this leads us to the consideration of what is the true meaning of the word "cruise," as used in the connexion, in which it stands in the shipping articles. By a cruise, I understand a voyage for the purpose of making captures *jure*

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belli. Lord Mansfield, in the case cited,⁷ has said, that it is a well known expression for a connected portion of time. This language is used with reference to a policy then before him, containing a "liberty to cruise six weeks," which, it was contended, meant a cruising for six weeks not merely in succession, but at distant intervals, if the aggregate time did not exceed that space. His lordship is not, therefore, to be understood to assert, that a cruise *ex vi termini* includes a given portion of time, without reference to the place of commencement or termination, but only that it includes a connected portion or immediate succession of time, in whatever manner the same may be calculated. And this is true also as to a voyage. The boundaries of a cruise, like those of a voyage, may be defined by local limits or by artificial time, or by both combined. It is just as competent to engage on a cruise from *Boston* to the *East Indies* and back again, as on a cruise for a year. It is true, that the term "voyage" is frequently applied to the passage of a ship from one defined port to another,⁸ but it is also sometimes used with a more obscure reference to place, and with a direct limitation of time. Cases are familiar of an insurance for a limited time on a fishing voyage, or coasting voyage, or on any voyage or voyages, without any specification of place.⁹ In the same manner, an insurance may be on a privateer for a cruise, or for a cruise of a limited period. In short, a cruise is nothing but a voyage for a given purpose, and may, therefore, be properly defined to be a *cruising voyage*, or voyage to make captures *jure belli*; and so it is clearly considered in our statutes.¹⁰ And a cruise, like a voyage, imports a definite place of commence-

⁷ *Syers vs. Bridge*. Doug. 527. ⁸ *Marsh. Insur.* B. 1, ch. 6, s. 1.

⁹ 1 *Emer. on Ins.* ch. 3, § 2, p. 63.—*Casar. Disc.* 1, n. 127.—2 *Vallin Comm.* 36, B. 3, tit. 6, art. 35.—*Casar. Disc.* 67, n. 31.

¹⁰ *Act.* 26th June, 1812, ch. 107, s. 10.

ment and termination, unless that construction be repelled by the context. If seamen engage to go from a port on a fishing or whaling voyage, this includes not merely the period, in which the vessel is engaged in the fisheries, but also the return voyage to the home of the vessel. This construction results by necessary implication, either from the known usage of the ordinary trade, or from a legal presumption of the intentions of the parties, made to obviate great inconveniencies, or apparent absurdities. It is considered as a *casus omissus*, in which the law steps in, and in furtherance of the apparent objects of the parties, or of public policy, supplies the omission by a reasonable interpretation and extension of the contract in unforeseen emergencies. The same doctrine applies, in the same latitude, to a cruise. If no provision is made to the contrary, it must be presumed that a cruise comprehends a return to the country, if not to the home port, of the privateer. This is the ordinary usage of the employment, and the manifest expectation of the laws. It comports with the known policy of the country, which is unfavourable to the discharge of our seamen in foreign ports; and subserves the most important public, as well as private, interests. I reject, therefore, altogether the definition of a cruise, which would strike out all reference to place in respect to its *termini*; and I farther hold, in conformity with the language of the prize statute, " that a cruise may still have a continuance, notwithstanding an arrival in port, and is not necessarily extinguished thereby, unless such inference result from the express stipulations, or the overt acts of the parties.

It being then settled, that a cruise imports a return voyage to the country or port of the domicil of the ship, unless that construction be repelled by the context, we are next led to the consideration, whether in the present con-

¹¹ *Act. 26th June, 1812, ch. 107, s. 10.*

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tract there be any thing to repel that construction. The parties have limited the commencement of the cruise to the departure from the port of equipment; and from the facts it seems clear, that the cruise legally commenced on the first day of November, when the *Brutus* left *Boston*. I cannot adopt, in this respect, the opinion of the learned Judge of the District Court, postponing the commencement until the departure from the port of *Salem*. That opinion seems to have proceeded upon the rule of a foreign ordinance,¹² which fixed the commencement of the cruise from the doubling of the capes, or points of usual departure.¹³ The general rule of our law, like that of the civil law,¹⁴ is that the voyage commences, when the ship breaks ground for the purpose of departure; and the parties have here expressly fixed it to the time of sailing. The term stipulated in the articles, therefore expired, by its own limitation, on the first day of the ensuing February. If at that time the privateer had been in a port of the *United States*, in the ordinary course of the cruise, it is incontestable, that the officers and crew would have been absolved from any farther service. On the other hand, if the privateer had returned within the term, unless the owners had exercised the election given them, the articles would have subsisted in their full obligation.

But it is argued by the plaintiffs' counsel, that the privateer having been forced into *France* for repairs occasioned by inevitable accidents, the whole time consumed there in necessary repairs is to be deducted from the account of the cruise. In other words, the running of the term is to be considered as suspended during that period. And they rely

¹² Ord. 1778, art. 21.—2 *Emer. Assur. ch.* 13, s. 1, p. 10.

¹³ "Qu'il a double les caps ou pointes, qui suivant les usages locaux determinent un depart absolu." 2 *Emer.* 10.

¹⁴ In nautica pecunia, ex ea die periculum spectat creditorem, ex quo navem navigare conveniat.—3 *Poth. Pand.* 826, n. 1594,

on the regulations of the French ordinances to support their position.¹⁵ These ordinances seem highly reasonable in themselves; but in the terms, in which they are conceived, they are rather positive municipal regulations, than evidence of the general maritime law. A class of cases more pointed to the purpose of the plaintiffs is that of licenses, granted during war to carry on an interdicted trade. There, it has been held, that if the license be for a limited time, and the party is prevented by superiour force, or by the fury of the elements, from completing his voyage within it, he shall still be entitled to its protection. While the party is baffled by these obstructions, the intervening time is held, as it were, annihilated, and he is put again in possession of the time so lost.¹⁶ This construction is founded upon a large and liberal exposition of the intentions of the government, and in furtherance of a great national policy. But it will be difficult to shew, that the same rule has ever been adopted either in the common or the maritime law in respect to civil rights, or contracts between citizens.

The general principle of the common law is, that when a term of time begins to run against a party, it is not suspended by any intervening casualties. This doctrine is familiarly applied to statutes of limitation, where no exception is admitted, unless it stand in the text of the statute book. It is also applied in relation to civil contracts upon time, where no excuse is allowed for non-performance according to the terms of the engagement. And a striking illustration of the same principle may be seen in the maritime law, where it is held, in an insurance on time, that no intervening accident suspends or enlarges the stipulated period

¹⁵ Ord. 1683, art. 5.—2 Valin, *Prises*, 36.—2 Valin, *Comm.* 231.—1 *Code des Prises*, 147.—Ord. 1778, art. 21.—2 *Emer. Ass. ch. 13, s. 1, p. 10.*—Ord. 1781, art. 21.—2 *Code des Prises*, 641, 920.

¹⁶ *The Good Hope*, 1 *Edm. R.* 327.

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of the policy ;¹⁷ and in the analogous cases of warranty to sail on a particular day,¹⁸ and covenants in charter parties on time.¹⁹ The maxim, that an act of Providence shall work no prejudice to any one, has not been supposed to apply to such cases, because each party might properly avail himself of the same shelter. As, therefore, in analogous cases, neither the common nor the maritime law affords any relief, and cannot be drawn in aid of the argument from the French code, I feel myself bound to adhere to the strict rule of the contract. "*Lapso tempore, extincta est materia obligationis, et consequenter obligatio, quia post tempus alia est materia, alia res.*"²⁰ As, therefore, the fortuitous occurrences did not enlarge the term, or suspend the efflux of its time, it follows that it expired, by its own limitation, on the first day of February.

But the principal difficulty still remains. For, admitting that the term stated in the articles expired, it does not follow that the cruise, in legal contemplation, was determined: What effect a limitation of time engrafted on a contract for a cruise shall have, is a question of no inconsiderable moment and intricacy. Is it to be construed as forming a *terminus* of the cruise, altogether independent of the place where it elapses, as the respondents contend? or is it to be construed as a mere limitation of the time, in which the privateer is to be engaged in cruising, and of course, at the end of the term, to compel the parties to an immediate return home, as is maintained by the libellants? This is one of the turning points of the cause.

¹⁷ 1 *Emer. Ass.* ch. 3, s. 2, p. 63.—2 *Emer. Ass.* ch. 13, s. 1, p. 5.—*Ossar. Disc.* 1. n. 178.—*Id.* *Disc.* 67, n. 31.—*Poth. Ass.* n. 62.—*Ord. de la Marine*, tit. 6, art. 34.

¹⁸ *Hore vs. Whitmore*, *Comp. R.* 784.—*Marsh. Ins. B.* 1, ch. 9, s. 4.

¹⁹ *Shubrick vs. Salmond*. 3 *Burr.* 1637.—*Abbott on Shipping*, part. 3, ch. 1.

²⁰ 2 *Emer. Ass.* 8.

If the doctrine of the respondents be well founded, it will follow, that after the lapse of the stipulated term, the crew may abandon the ship, or be abandoned immediately on the broad ocean, or in a desolate island. Let the event happen where it may, there will immediately ensue a complete dissolution of all authority, responsibility, and subordination, on board of the ship. There will be no longer officers or crew; for all parties will be equally, to all intents and purposes, *functi officio*. These would be mischiefs of a most enormous character, and it is impossible to believe, that reasonable men could ever intend that any contract of theirs should seriously receive an interpretation, that would lead to such a result. It may be said, that these evils could be of very rare occurrence. But the fact is, that from the very nature of the service, and the dangers and difficulties, with which it is encompassed on every side, from the irresistible force and fury of the elements, as well as the vigilance and activity of the enemy, it would be impracticable, for the most prudent and cautious men, to guard against an overrun of the stipulated period. Nor is it any answer, that the common principles of humanity would forbid an abandonment of the ship or a refusal to perform the services necessary for her preservation; for, if such conduct were lawful, the parties could not be made responsible for any want of humanity in the exercise of their ordinary rights. From the very necessity of the case, therefore, the law must interpose, and put such a construction on the express stipulations of the parties, as common reason, and justice, and humanity dictate, and supply, from natural equity, such engagements, as the parties have indiscreetly omitted to state. What, indeed, upon the doctrine of the respondents' counsel, are to become of prizes captured after the stipulated period, if the ships be then at sea? Are they to be condemned to the government, as having been made by

non-commissioned vessels? If there be no legal connexion between the officers and crew and the privateer, they could not be condemned to the captors, for the commission has no legal existence, when this connexion is completely dissolved. In short, there is no end to the difficulties and inconveniences of this interpretation. In the absence of all contrary stipulations, it is, in my judgment, in the highest degree reasonable to hold, that a contract for a "cruise" legally terminates in the country, to which the privateer belongs, and from which she derives her commission; and that, if a limitation of time be engrafted on the contract, it shall operate merely to ascertain and limit the time, which may be employed in actual cruising, and after that period require an immediate return to the port or country of origin, the *forum domicilii navis*, by the most convenient and direct route, without any deviation for the purpose of making captures. Every argument of public policy, and commercial convenience, and private interest, supports and fortifies this doctrine; and it coincides with the legislative policy, which has uniformly manifested itself in an extreme solicitude, as well in peace as in war, to recall our seamen to their native country. So strongly indeed do I think this construction to be founded in the real intentions of the parties, that if the contract were expressly in terms "for a cruise of three months," without any reference to place, I should hold it but a compendious and imperfect declaration of their object, and establish upon it the same commentary, which I have already ventured to avow and vindicate.

I have not, therefore, any hesitation in applying this construction to the articles now before the Court. I consider, that the parties have, in effect, stipulated, that the privateer might cruise three successive months from the time of sailing. After that period, it was no longer in the power of the commander or owners to prolong the voyage for the pur-

pose of making captures; and wherever the privateer might then be, she would be bound to return to the *United States*; and any deviation on the homeward passage, for the purpose of cruising, would be a violation of the articles, entitling the injured parties to redress in damages. And all captures made in such homeward voyage would still be captures "during the cruise," and distributable according to the regulations of the articles.

Nor does the clause in the articles, giving the owners an option to determine the cruise at an earlier period, impugn or shake this interpretation. That clause did not, and could not, in the nature of things, be supposed to authorize the owners to break up the cruise, when and where they should please to exercise an arbitrary discretion. It would be utterly unreasonable to suppose, that they might break it up upon the mid ocean, or on some uninhabited coast, and thereby expose the officers and crew to the most serious perils and oppressions. The clause was inserted with a very different aspect, to meet a practical difficulty, which often attended expeditions of this nature. It not unfrequently happened, that shortly after sailing upon the cruise, from the perils of the seas or the presence of a superiour hostile force, privateers were compelled to enter some friendly port, or to return to their port of departure. Under these circumstances, it had become a subject of controversy, (though I presume not of any serious legal doubt,) whether the cruise was ended; and, as the seamen usually disposed of a large share of their interests in the proceeds of the cruise, there was a strong temptation to avail themselves of the supposed uncertainty of the law. This was the real origin of stipulations of this nature, which had latterly, in some shape or other, been incorporated into most of the common shipping articles. The reasonable construction of the clause is, that if the privateer should re-

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turn into a port of the *United States* within the three months, the owners might, upon a full knowledge of all the facts, have an option to continue the cruise or not. And, therefore, whatever may be the rule as to other acts, this was necessarily a personal authority or confidence reposed in the owners at home, and could not be exercised by themselves, and much less delegated to any agent, to be exercised, at his discretion, in any foreign country.

Upon the interpretation of the shipping articles, which we have now been considering, the cruise did not determine at *Quimper*, on the first day of February, although the time for cruising did; but the cruise had a legal existence until the return of the privateer to the *United States*. I have not, in the preceding view of the case, thought it necessary to consider, what was the peculiar situation of the privateer at *Quimper*, at the end of the three months, because, if the respondents' counsel were right in their reasoning, it became wholly immaterial, where she might happen to be; and, if they were wrong, it could only be upon principles, which would stand unaffected by such considerations.

In the remaining inquiry, the transactions at *Quimper* assume a very different aspect. It is argued, that the original cruise was, at that place, put an end to by the consent of all the parties in interest, and a new cruise substituted in its stead, and that the prizes made during this latter cruise, can with no propriety be referred back to the original articles.

The engagement of parties to serve on board a private ship of war for a cruise, in consideration of a certain share of the prize money, constitutes a sort of partnership *pro hac vice*.² If the cruise be limited in time, the partnership

² *Abbott on Shipping*, part 4, ch. 1, p. 461.—2 *Valkm Comm. art.* 32, 33, pp. 359, 392, &c.

cannot be dissolved during the term, unless by the consent of all the parties, for whose benefit the clause is inserted, or to whom, from the nature of the covenant, an implied or express authority for this purpose is reserved. In these respects, the same rule is applied, as in cases of ordinary partnerships.²³ There is no pretence, that the owners, in the present case, directly consented to the breaking up of the original cruise in *France*. It is very clear, that the commander had no express authority from the owners to form a second cruise. He declares, that he had authority to break up the first cruise in *France*, and convert the privateer into a letter of marque, and to return with a cargo to the *United States*, if he should deem it expedient. But, in point of fact, he never acted under this authority; and the second cruise was substituted for the first under a supposed necessity resulting from a mistake of the legal rights of the parties. Was there then an implied authority resulting from the nature of the office of a commander, to break up the cruise, whenever in his discretion he should deem it expedient? We may put out of view all consideration of cases of extreme necessity, where, by analogy to other well known exceptions, such an authority ought to be presumed; ²³ for here no such necessity existed. Upon principle, it does not strike me, that any such general authority, as is contended for, can be supported by implication. The commander is appointed for a single cruise, and must be deemed to have all the powers necessary and proper to accomplish the purposes of that cruise. But a power to break up a cruise can never be implied from a power to perform it; nor a power to institute a new cruise from an appointment to superintend and direct the operations of an existing

²³ *Wals. on Part.* 381.

²³ *Hayman vs. Moullon*, 5 *Esp. R.* 95.—*The Gratitude*, 5 *Rob.* 240.
—*Reid vs. Darby*, 10 *East. R.* 143.

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cruise. There is a case put by *Bynkershoek*,²⁴ which completely establishes a similar doctrine. The question was, whether the commander of a privateer had an implied authority, during the cruise, to enter into engagements with other cruisers to cruise and make captures on joint account. And this great civilian holds, that no such authority could be implied from the nature of the office, or of the service. That was a stronger case in favour of the commander, than the present; and yet the opinion of *Bynkershoek* seems founded in solid reasons; for the act of the master was, in effect, the establishment of a new partnership and of new interests in the cruise. Nor is any public policy promoted by establishing such an implied authority. It would offer temptations to unnecessary hazards and new enterprises, beyond the control and superintendence of the owners; and make it for the interest of seamen, who had parted with their shares, to create impediments in the voyage, and indirectly compel the commander to engage in new stipulations for new adventures. If indeed the commander have such an implied authority to engage in a new cruise, he must have a like authority to purchase new outfits and to vary the whole stipulations of the contract, and the division of the prize money; and thereby may involve the owners in great risks and expenses, without securing to them any adequate remuneration. In every view, in which this subject can be contemplated, there seem strong reasons for rejecting the doctrine, which would raise so broad a superstructure of implied powers upon so narrow a foundation. I remain of the opinion, that the stipulations for a second cruise, being unauthorized by the owners, were originally invalid; and if they have been subsequently ratified, this ought not to affect third persons, whom they did not in the first instance bind.

²⁴ Q. J. P. ch. 18, p. 141.—*Dupon. Ed.*

In the case at bar, some of the libellants were separated from the ship, and put on board of prizes, to navigate them into port. This was a most meritorious service for the common benefit; and they are entitled to share in all prizes subsequently made during the cruise, in the same manner, as if they had remained on board; and it was not competent for the other parties, by any acts or agreements, to divest this original right. In respect to these persons, therefore, the breaking up of the cruise at *Quimper* (supposing it good as to all other parties) was not a binding act. They might still claim their shares of all prizes subsequently made, until the original cruise was legally determined by the return of the privateer to the *United States*; for, in a prize court, it can never be permitted to set up a tortious proceeding as a protection against vested rights. And, in asserting this rule, I do nothing more, than follow up a principle long since established in the highest prize tribunal of this country.²⁵

The remaining question is, whether the same doctrine can be applied, as between the assignors and assignees. There is no doubt, that, by the assignment, a legal interest passed in all prizes captured during the cruise, which should be condemned to the captors.²⁶ But the point of difficulty is, whether the act of putting an end to the cruise at *Quimper* is to be deemed utterly void, so as to bring the subsequent captures within the language of the assignment; or whether the parties are to be left to a common law remedy for damages on account of this unlawful deviation from the contract. The argument on one side is, that the assignees are not to be prejudiced by the tortious acts of their assignors in breaking up the cruise; and on the other side, that as the cruise was broken up, by right or by wrong, the assignees cannot claim any share of the prizes subsequently

²⁵ *Keane vs. The Gloucester*, 2 Dall. R. 36.

²⁶ *Morrrough vs. Comyns*, 1 Wils. R. 211.

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captured, for they were not captured "during the cruise," on which the privateer was originally bound.

The assignees must be presumed to have had full knowledge of the original shipping articles, and consequently of the nature and extent of the cruise. They were put upon the inquiry by the very terms of the assignments, and if they waived the inquiry, they must now be bound by all the qualifications and conditions originally interposed by the parties. Nothing, therefore, can be drawn in aid of their pretensions from this source; and the attempt of the counsel for this purpose must utterly fail.

It is a sound principle of natural justice, as well as law, that no man shall take advantage of his own wrong. This maxim will be found in the codes of all civilized nations; though the manner in which it is applied for the purposes of justice, must depend upon the municipal regulations and remedies of each particular country, and the courts, in which the same are enforced and administered. A court of admiralty is not bound by the narrow and technical distinctions of common law proceedings. It has an enlarged and liberal discretion, and may decree *ex æquo et bono*, upon principles of equity and good conscience. It will, therefore, sometimes consider that as done, which ought to have been done, not by decreeing a specific performance, but by placing the parties in the same situation, as if there had been such performance. Thus, if a mariner be wrongfully dismissed from service during the voyage, wages will be decreed in the same manner, as if he had served to its successful conclusion. It may, in like manner convert a wrong-doer into a trustee for the benefit of the rightful owner, as even a court of common law sometimes does by a waiver of the tort. If it may decree thus, sitting as an instance court, *a fortiori*, it may apply the most large and liberal equity, when sitting as a court of prize, and emphatically adminis-

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tering the law of nations and the general principles of civil justice. It is peculiarly fit, under such circumstances, that it should entertain the rule, that the wrong-doer shall not profit by his own unauthorized act; and give the fruits to those, who, if they have not laboured in the field, are in equity entitled to the harvest. I am, therefore, prepared to assert, that the assignees ought, upon principles of public policy, to be let in to share in the prize proceeds now in the custody of the Court. The prizes were captured, while the privateer was sailing under the commission, by virtue of which the original cruise was undertaken, and condemnation to the captors sought and obtained; and that cruise was not, in point of law, extinguished.

On the whole, I affirm the decree of the District Court; but I shall order the whole costs and expenses on each side to be a charge on the prize proceeds. It was impossible to settle the account of any of the parties, until this question was decided.

EX PARTE, MARQUAND.

"Fines" imposed for obstructing officers of the customs, as well as "penalties," under the act of March 2d, 1799, ch. 128, are to be received and distributed by the collector of the customs.

AT this term, *N. Hobson* and others, were convicted on an indictment for forcibly resisting and impeding certain officers of the customs at *Rowley*, within the collection district of *Newburyport*, against the 71st section of the act of 2d of March, 1799, ch. 128. The fines imposed by the Court having been paid into the hands of the marshal, a motion was made in behalf of Mr. *Marquand*,

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collector of *Newburyport*, to have the same paid over to him for distribution pursuant to the 91st section of the same act.

G. Blake, District attorney, stated, that he had been requested by the collector to make the motion; but should submit it to the Court without argument. The practice had uniformly prevailed, in cases of fines under this act, to pay them directly into the Treasury, and no instance had heretofore occurred, in which they had been claimed or received by a collector for distribution.

By the Court. It is not a little extraordinary, that this question should have slept in silence during so long a period. The 91st section of the act of March 2d, 1799, ch. 128, provides, that all fines, penalties and forfeitures, recovered by virtue of that act, and not otherwise appropriated, shall, after deducting all proper costs and charges, be disposed of as follows, one moiety shall be for the use of the *United States*, and be paid into the Treasury thereof *by the collector receiving the same*; the other moiety shall be divided between, and paid in equal proportions to, the collector and other officers of the customs specified in the act, with a proviso giving a moiety of such moiety to the informer, by whose information to the collector the same fines, penalties and forfeitures shall be recovered. The 89th section of the same act authorizes the collector to receive all penalties, recovered under the act, from the court or the proper officer thereof, and farther enacts, that "on receipt thereof the said collector shall pay and distribute the same without delay according to law, and transmit quarter yearly to the Treasury an account of all monies by him received for fines, penalties and forfeitures, during such quarter."

The former act for the collection of duties,¹ which was repealed by the act of 1799, contains similar provisions as to distribution of *fin*es, penalties and forfeitures,² and as to the receipt and distribution of *penalties* by the collector;³ but there is no clause respecting the transmission of quarterly accounts of monies received for *fin*es, penalties and forfeitures. As the 89th section of the act of 1799 is, with the exception of this clause, a substantial re-enactment of the 67th section of the act of 1790, it is highly probable, that a doubt had arisen, whether the right of the collector to receive and distribute "penalties," included that of receiving and distributing "fines," and that this clause, among other objects, was meant to obviate that doubt. This explanation, if correct, will in part account for the unsettled state of the present question.

On looking at the language of the act of 1799, it seems difficult to resist the impression, that "fines" in the technical sense of the word, as well as "penalties," are to be received and distributed by the collector. There are indeed but two cases, in which, technically speaking, fines are contemplated to be imposed by the act, *viz.* in cases of obstructing officers of the customs⁴ and of perjury.⁵ In all other pecuniary forfeitures within the act, the legislature seem to have directed, not the process of indictment, where a fine might be imposed, but an action or information of debt; for, at common law, wherever a penalty is given, and no appropriation or method of recovery is prescribed by the act, an action or information of debt lies, and not an indictment.⁶ There may be

¹ 4 Aug. 1790, ch. 25.² Sect. 69.³ Sect. 67.⁴ Sect. 71.⁵ Sect. 88.⁶ *Res vs. Malland*, 2 Str. 828.—*Adams vs. Woods*, 2 Cranch, 336.

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good reason for this distinction, for penalties and forfeitures may be remitted by the Secretary of the Treasury under the act of March 3d, 1797, ch. 67; but, notwithstanding the language of that act, it is extremely doubtful if fines for offences, technically speaking, can be so remitted, since the constitution has committed to the President the power to grant reprieves and pardons for offences against the *United States*.¹

It is singular, that bribery of officers of the customs should, by the act of 1799, be punishable only by a pecuniary forfeiture; and still more singular, that, as no other appropriation of the penalty is made, half of that penalty might, *following the letter of the act*, be received by the very party bribed.

Of the policy of a distribution of fines imposed for public offences, or of allowing them to be received and distributed by collectors of the customs, in cases within the express purview of the act of 1799, we do not pretend to judge. It is sufficient for us, that the legislature have expressed their will in direct and unequivocal terms; and we accordingly direct, that the fines imposed upon the defendants, and now in the hands of the marshal, after deducting the proper charges allowed by the Court, be paid over to the collector.

¹ *United States vs. Mann, ante Vol. 1, pp. 177—186.*

HARVEY vs. RICHARDS, ADMINISTRATOR *cum testamento annexo* of
JAMES MOWRY.

Issue out of chancery.

AT the last term of this court,¹ an order was made, directing the parties in this cause to proceed to trial at law,

¹ *Ante*, p. 216.

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upon the following point, *viz.*: "Whether the said *Mary Harvey* is the sister and sole next of kin of the said *James Mowry*, otherwise called *Murray*, or not?" The trial to be had by a jury for that purpose to be duly impaneled, and after the trial had, the parties to resort to the equity side of the Court for such farther orders, as should be necessary and proper.

By consent of the parties, a special jury was impaneled¹ to try this issue,² who returned their verdict as follows:

"The jury, having maturely considered the evidence produced, find that the said *James Murray*, alias *James Mowry*, was the legitimate son of *Joshua Mowry*, and *Hope*, his wife, and that one *John Mowry*, his brother, now living, and *Mary Harvey*, the complainant, his sister, are his sole next of kin and heirs at law."

² The practice of summoning special juries appears, from the records of our courts, to have been early prevalent in *Massachusetts*; (a) but it has been long disused, and there is now no power, in any state court of this state, to proceed otherwise, than by a jury returned and selected, according to statute provision, by drawing their names from a box kept for that purpose by the selectmen of each town.

¹ (a) *M. S. S. Records. Court of Assistants, Suffolk County. March, 1691.*—*Andrew Belcher vs. James Lloyd.* Appeal from the County Court in an action on a charter party. The appellant desired a special jury of merchants, which was accordingly granted. There are many like cases.

CIRCUIT COURT OF THE UNITED STATES.

RHODE ISLAND, NOVEMBER TERM, 1815, AT PROVIDENCE.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
 { Hon. DAVID HOWELL, District Judge.

BROWN AND IVES, vs. MINTURN AND CHAMPLIN.

An assignment of property for the benefit of creditors is good against a subsequent attachment, although the creditors were not originally parties to the assignment, if they have in fact assented thereto before the attachment.

Quere, if such assent be necessary, to make such an assignment valid against attachments of other creditors.

THIS was an action on the case, to recover the amount of certain notes made by the defendants and endorsed to the plaintiffs. There was a plea in abatement and issue thereon, arising under the state laws of *Rhode Island*, in which the sole question was, whether the goods, attached in the suit, were, at the time of the attachment, the property of the defendants or not.

Upon the trial of the cause, it appeared in evidence, that the goods attached were the schooner *Sally* and cargo, which had arrived at *Newport* from *Canton*. The *Sally* and cargo originally belonged to the defendants, who were merchants at *New York*, and all the papers and documents of the vessel and cargo were in their name at the time of

her arrival. During the voyage, the defendants having failed in business, on or about the 6th of October, 1814, executed an assignment of a large mass of property, including the *Sally* and cargo, to Messrs. *Hone, Newbold* and *Abbot*, for the benefit of certain creditors enumerated in a schedule annexed to a declaration of trust accompanying the assignment. There was an attendant bond given by the defendants to the trustees, at the time of the assignment, as additional security, acknowledging a debt equal to the amount due to all the scheduled creditors. None of the creditors were parties to the original assignment; but it was in fact made at the instance and with the assent of two of the banks in *New York*, which were creditors to a very large amount, and as to some of their claims, had a priority given in the assignment. Most of the other creditors, within a few days after the assignment, and before the arrival of the vessel, assented to it, and had in fact, since that time, received their dividends, under its authority. The *Sally* arrived at *Newport* on the 26th of October, 1814, and on the same day possession was taken of the vessel and cargo by the agents of the trustees, with the consent of the master, in virtue of the assignment; and, in the manifest of the entry at the customhouse, a memorandum of the title of the trustees was added in the original column of the consignment. The present attachment was made on the 28th of the same month of October.

Thomas Burgess and *Burrill*, for the plaintiffs, contended, that the assignment was void, the creditors not having originally been parties to the assignment; and that therefore it was a fraud upon the attachment law of the state of *Rhode Island*; and they, in the next place, endeavoured to establish that the assignment was fraudulent in point of fact.

Hasard and *Searle*, for the defendants, contended, that it was not material that the creditors should have been originally parties to the assignment; and that, at all events, it was sufficient if they assented before the present attachment was made; even supposing an assent was necessary to sustain the assignment. That in fact the creditors had generally so assented, and the two banks in *New York*, who were the original projectors or advisers of the assignment, were creditors to an amount more than equal to the value of the *Sally* and cargo, and all other property, which had come to the hands of the trustees; and that there was the clearest evidence in this case, that the whole transaction was *bona fide*.

STORY, J. (after summing up the evidence to the jury). Upon this evidence it does seem to me that, if it is believed, there is not the slightest imputation of fraud in the transaction. The assignment was made for a meritorious purpose, to secure the payment of the debts of *bonæ fidei* creditors. Every debtor has a legal right to assign property for the security of the debts due by him; and so far from such an act being reprehended by the law, it is justified and approved.

It is argued, however, that in point of law the assignment was fraudulent, because the creditors were not originally parties to the instrument. This objection cannot prevail; for, at all events, it is sufficient to uphold the assignment, that the creditors assented long before this attachment. The assignment was made for their benefit, and by their subsequent assent, notified to the assignees, they acquired not only an equitable, but a legal, title to their proportions of the trust money. Whether, in point of law, such an assent be necessary to uphold the assignment, supposing it good in other respects, I do not decide. I am aware, that it

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has been holden, that general assignments, made without the assent, but for the benefit, of creditors, are frauds upon the attachment law. But there are great authorities opposed to the principle of this doctrine; and I desire to reserve an opinion, until it is the turning point of the cause. The present case steers wide of the objection.¹

*The Jury found a verdict for the defendants.*²

¹ Vide in addition to the authorities cited, *ante* vol. 1, p. 429, *note* 6, 5 T. R., 424.—5 T. R. 530.—8 T. R. 528.—1 John Cas. 156.—1 Dall. R. 72, 139, 430.—4 Dall. R. 85.—1 Binn. 502.—2 Binn. 174.—1 Camp. R. 147.—*Meuz vs. Howell*, 4 East. R. 1—and particularly *Pickstock vs. Lyster*, 3 Maule and Selw. 371.

² No question was made at the bar, and therefore no opinion was given by the Court, how far the plea in abatement was good in point of law, it being in fact contrary to the return of the officer. It has been generally considered, that the return of the officer could not be contradicted in the suit before the Court; and that the parties were left to their remedy for a false return; or if property were attached, that the real owner (if not a party to the suit,) might maintain replevin or trespass.—Vide *Slayton vs. Chester*, 4 Mass. R. 479.—*Gardner vs. Hosmer*, 6 Mass. R. 325.—*Comyn's Dig. Return G*.

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No action can be maintained, against a master and part owner of a ship engaged in the slave trade, by his partners in the joint concern; nor against an agent, who is party to the original illegal traffic, and has the proceeds in his hands. If a ship be sold in a foreign port, to evade a forfeiture incurred to the United States, no action can be sustained for the proceeds.

An assignment, *with notice*, of a chose in action, founded in illegality, will not protect the parties from the legal consequences attached to the original contract. If a chose in action, *not negotiable*, be assigned, *without notice* of any fraud or illegality in its origin, the parties are not precluded from setting it up as a defence, in the same manner, as if there had been no assignment.

In an action between the original parties, an assignment to a third person cannot be set up to defeat the defence of illegality in the original contract, which is assigned.

ASSUMPSIT to recover a balance of account due from the defendant, as agent and factor of the plaintiffs. The de-

claration contained the money counts, and several special counts ; in some of which the promise was alleged to be to the plaintiffs, and, in others, to the plaintiffs as trustees of *Benjamin Homer*. The action was brought in May, 1803, and had been continued for many years under a reference to arbitrators.

The cause was tried upon the general issue. It appeared in evidence, or was admitted by the parties, that the plaintiffs were owners of two third parts of the brig *Peggy*, and the defendant was master and owner of the other third part. In the year 1799, the brig was fitted out, on joint account, on a slave voyage, from *Boston* to *Georgia*, thence to the coast of *Africa*, and thence to the *West Indies*. The brig accordingly sailed on the voyage, went to *Africa*, and there took on board 150 slaves, who were carried to the *West Indies* and sold ; and afterwards the brig was, under the original instructions for the voyage and as a part of the project, sold by the defendant at *St. Bartholomews*.

The present action was brought to recover the two third parts of the proceeds of said voyage, and also of the outfits of the voyage, advanced or paid by the plaintiffs.

The plaintiffs having failed in business, on the 24th of June, 1801, drew an order, in favour of *Samuel Brown*, requesting the defendant to pay him or order the balance due on one half of the brigantine's voyage, deducting outfits, &c., which order was, on the 17th of the ensuing July, accepted by the defendant. On the same day (24th of June, 1801) the plaintiffs drew another order in favour of *Benjamin Homer*, requesting the defendant to pay him or order one sixth part of the net proceeds of the brig *Peggy's* voyage, and, on the 1st of December following, the defendant agreed, in writing, to pay to said *Homer* one sixth part of the balance that might be due on said

voyage. It was asserted, but no proof was offered, that *Brown* had assigned over all his interest, under his accepted order, to *Homer*.

Upon these facts, a verdict was taken for the defendant, under the direction of the court.

And now *Robbins*, of counsel for the plaintiffs, moved for a new trial. He said, that he did not contend against the general principle, that no action at law could be maintained upon an illegal contract. Here, however, the interest of the plaintiffs had been assigned, and the assignees are purchasers for a full and valuable consideration; and the suit is for their benefit. They are not affected by the illegality of the contract. Besides, here is an express promise to pay the assignees.

In the next place, the defendant is sued as an agent; and an agent cannot take advantage of an illegality in the contract to withhold money from his principal. To this effect, are *Tennant vs. Elliot*,¹ *Farmer vs. Russell*.²

But supposing this be not correct, yet the plaintiffs are entitled to recover the money, for which the brig was sold in the *West Indies*.

Hunter, for the defendant. The sale of the brig was a part of the original illegal transaction. It was done to evade the forfeiture incurred to the *United States*. The case of *Aubert vs. Mass*³ is decisive against the argument of the other side.

STORY, J. You need not labour the argument. Certainly this action cannot be maintained. The traffic in

¹ 1 Bos. and Pull. 3.

² 1 Bos. and Pull. 295.

³ 2 Bos. and Pull. 371.

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slaves is a most odious and horrible traffic, contrary to the plainest principles of natural justice and humanity. And it has been very forcibly and correctly observed by a learned Judge,⁴ that, abstractedly speaking, it cannot have a legal existence. The laws of the *United States*, long before the inception of this voyage,⁵ prohibited, under severe penalties (including the forfeiture of the vessel) any trade by *American* citizens in carrying slaves to, from, or between any foreign countries. The voyage was, therefore, in its very elements, infected with the deepest pollution of illegality; and the present action is brought between the very parties, who formed and executed this reprehensible enterprise. But the court are told, that an agent has no right to set up, in his own defence, the illegality of the contract between himself and his principal. It might be a sufficient answer to this argument, that this is not the case of a mere agency, but of a partnership in an illegal transaction; and nothing is better settled, than that, as between partners, no action can be sustained upon a contract in violation of the laws. But there is nothing in the argument itself, standing upon the footing of a mere agency. The cases cited do not at all come up to the position contended for by the plaintiffs' counsel. The most that they decide is, that if money due on an illegal contract be paid into the hands of a third person, for the benefit of one of the parties, he may maintain an action to recover it, for it is money paid to his use. But they do not decide, that if the agent be a party to the original transaction, and the money in his hands be the proceeds of the illegal contract, such a recovery can be had against him. Nor do I perceive how, upon principle, such a decision could be sustained. A party

⁴ *Sir W. Grant.—Wharton on Captures*, 229.

⁵ *Act 22d March, 1794, ch. 11.*

alleging his own turpitude shall not be heard in a court of justice to sustain an action founded upon it; and, where the parties stand in *pari delicto*, the law leaves them, as it finds them, to reap the fruits of their dishonesty, as well as they may.

As to the sale of the ship, it was a part of the original scheme, evidently adopted to evade the forfeiture inflicted by the laws of the *United States*; and cannot be distinguished from the other items of claim.

But great stress is laid on the circumstance, that there has been an assignment to Mr. *Homer*; and it is argued, that at all events this completely purges away the original sin of the transaction, especially as the defendant has expressly promised to pay the assignees. In respect to the express promises, founded on the acceptance of the orders drawn by the plaintiffs, it is sufficient that the present action is not founded on them. The plaintiffs cannot draw in aid of the present suit promises made to third persons; and the counts alleging the promises to be to the plaintiffs *as trustees* are wholly unsupported by the evidence. Whatever may be the case therefore in a suit brought by the assignees in their own names on the acceptances, it is clear that, as between the parties to this suit, the assignment cannot affect the legal conclusion applicable to cases of illegal contracts.

It is not, however, pretended that the assignees are purchasers for a valuable consideration *without notice* of the original transactions. If, under such circumstances, the assignment could wipe away the original stains, it would be the most cheap and facile absolution, that fraud or cunning could devise. It would be a *carte blanche* for a general pardon of all offences. I do not so understand the law. The general rule is, that the assignee of a chose in action cannot stand in a better situation than his assignor, as to his rights

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against other persons, derived from the assignment. There are exceptions to this rule, founded upon public policy ; but they do not touch the present case. Where the assignees have notice of the nature and the circumstances of the claim, they are uniformly held affected by all the legal consequences attached to its original character, even in respect to negotiable instruments.* And where the instrument is not negotiable, even a want of notice has not been supposed to give validity to the assignment of a chose in action, which, as between the original parties, was infected with fraud or illegality. It is indeed extremely doubtful, whether after the express acceptances of the defendants, an action can be maintained, even with the consent of the assignees, against the defendants, upon the original contract. As the point was not raised at the trial, it is not necessary to decide it. But for the other reasons the motion for a new trial is overruled.

* *Steers vs. Lashley*, 6 T. R. 61.—*Brown vs. Turner*, 7 T. R. 630.

RECAPITULATION

TABER vs. PERROT & AL.

A former judgment is no evidence in an action, except between the same parties or their privies.

If an agent to collect and receive payment of bills, transmits them to his own private agent to receive the money, and place the amount, when received, to his private credit, payment to such agent is payment to the original agent ; and if there be a failure, it is the loss of the latter, and not of his principal.

A fortiori, this applies, where the money has been drawn for by a bill in favour of a third person, which has been accepted before the failure.

ASSUMPSIT, to recover a sum of money due from the defendants, as agents of the plaintiff, who is surviving partner of the firm of *Taber and Gardner*, under the following circumstances :—

Taber and Gardner, in 1802, being owners of certain bills drawn upon the French government by General *Le Clerc*, sent them to *France* by their agent *Mr. Boss*, who was then bound on a voyage to *Bordeaux*, in the brig *Polly*, belonging to the plaintiff and his partner. The cargo on board was on the joint account of *Boss*, *Taber*, and *Gardner*; and, on the arrival at *Bordeaux*, it was consigned to the defendants, who were then merchants in that city, for sale. *Mr. Boss*, finding that he could not sell the bills, placed them in the hands of the defendants, originally for the purpose of having them accepted, and ultimately for the purpose of having the proceeds, when paid by the French government, lodged in the hands of the defendants. In the mean time, the defendants advanced a return cargo for the *Polly*, upon the joint account of all the concern; and it was agreed, that the proceeds of the bills should, when paid, be carried to the credit of this advance. *Perrot*, one of the defendants, was a partner in a banking house at *Bordeaux*, under the firm of *Perrot and Bineau*, and, sometime in September, 1802, the bills were, by direction of the defendants, transmitted by *Perrot* and *Bineau* to the banking house of Messrs. *D'Hotel, Thomas and Co.* at *Paris*, with instructions to procure acceptance and payment of the same bills, and to carry the amount, when paid, to the credit of *Perrot and Bineau*. *Mr. Boss*, soon afterwards, went to *Paris*, and while there, about the 26th of October, 1802, received a letter from *Perrot* and *Lee*, informing him, that the bills had been sent to Messrs. *D'Hotel, Thomas and Co.* and enclosing an open letter, introducing him to that house, and also containing directions, that the money, when received, was to be placed to the credit of the banking house of *Perrot and Bineau*. The letter of introduction was duly delivered to Messrs. *D'Hotel, Thomas and Co.* On the 12th of Ja-

January, 1803, Mr. *Boss* called at the banking house of *D'Hotel, Thomas and Co.* and was there informed, that the bills had been duly accepted and paid by the French government, on the 7th of the same month; and that the amount had been duly credited to the account of *Perrot and Bineau*; and the credit was accordingly shown to Mr. *Boss*, in the ledger of the banking house. Mr. *Boss* immediately gave notice of these facts to the defendants by letter, and requested the amount to be passed to the credit of the voyage of the *Polly*, but received no answer. On the 25th of January, 1803, Messrs. *D'Hotel, Thomas and Co.* stopped payment. In the mean time *Perrot and Bineau* had drawn bills of exchange, at single usance, upon Messrs. *D'Hotel, Thomas and Co.* for the whole amount of the money so carried to their credit, in favour of a third person, which bills had been duly accepted, and when seen by Mr. *Boss*, were in the hands of another banking house at *Paris*. In consequence of the arrival of the *Polly*, on a second voyage on joint account, at *Bourdeaux*, consigned to the defendants, Mr. *Boss* returned to *Bourdeaux* about the 20th of February, 1802, and remained there until the sixth day of April following. A day or two before this time, his vessel being fitted for sea with a return cargo, he called on the defendants for an adjustment of accounts, and then was, for the first time, informed by the defendants, that they would not allow the credit of the bills received by them. Mr. *Boss* remonstrated with them in vain, and was, finally, obliged to settle the accounts and admit a balance due, of 45762 francs; and at his request, and for his security, on the credit side of the account, the following memorandum was added:—"April 6. By amount of General *Le Clerc's* bills in the hands of Messrs. *D'Hotel, Thomas and Co.* not received from these gentlemen, when received to be placed to the credit of this account."

The defendants afterwards commenced a suit, in *Rhode Island*, against *Boss*, *Taber* and *Gardner*, for said balance of 45762 francs, and finally recovered judgment in said suit, which had been fully satisfied.

The present action was brought to recover the amount of the bills received by *D'Hotel*, *Thomas* and *Co.* and carried to the credit of *Perrot* and *Bineau*, as above stated.

At the trial, the defendants counsel contended, that the action was *res adjudicata*, and therefore could not be sustained; and in support of this objection, offered the record of the action of *Perrot* and *Les vs. Boss*, *Taber* and *Gardner*.

STORY, J. The record cannot be read; it is *res inter alios acta*. A former judgment can only be evidence, where it is between the same parties, or their privies. The parties here are not the same; so far, therefore, from its being conclusive evidence against the plaintiff, as a former judgment upon the same cause of action, it is not evidence at all.

The defendants' counsel then contended:—1. That as the money had never actually come into the hands of the defendants, or of their bankers, *Perrot* and *Bineau*, no recovery could be had against them. 2. That if a right of action had attached, it was waived by *Mr. Boss*, by the memorandum on the account.

The counsel for the plaintiffs denied the legal correctness of both positions, and cited *Mathews vs. Hayden*.¹

¹ 2 *Espin. R.* 509.

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STORY, J. (after summing up the evidence.) There seems to be very little dispute as to the facts; and my duty now requires me to state the law on the points, which have been made at the bar. And I am of opinion, that as soon as the money was paid into the hands of *D'Hotel, Thomas and Co.* and by them, pursuant to their instructions, carried to the credit of *Perrot and Bineau*, the defendants were answerable, in the same manner as if it had been paid into their own hands. Payment to their agent and credit to their account, by their order, was a payment to themselves. But this cause does not rest upon this principle, plain and incontestible as it seems to me to be. The money was actually drawn for by *Perrot and Bineau*, payable to a third person, in whose favour an acceptance was made. Here then there was a complete appropriation of the funds to their own use. From the moment of the acceptance, the money was legally transferred to the holder of the exchange, and neither *Boss*, nor the defendants, nor *Perrot and Bineau*, had any legal title to it. No possession or use of the property could have been more complete.

As to the point of waiver, it is rather a question of fact, than of law. It was competent for the plaintiff to waive his right to hold the defendants to payment, and to agree to look only to *D'Hotel, Thomas and Co.* But such an agreement ought to be proved by the most clear and satisfactory proof. The agent, Mr. *Boss*, has sworn explicitly, that he never made such agreement, and that the memorandum on the account was merely introduced at his solicitation, to shew to his principals, that he had not mispent their funds. You will take also into consideration the peculiar circumstances in which he was placed, and decide

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for yourselves, whether an unfair advantage was not taken of them.

*Verdict for the Plaintiff.**

Scarle and Robbins, for the plaintiff.

Hunter and Burrill, for the defendants.

* This is the same case reported in 9 Crouch, 39. The cause was originally tried by the District Judge, some years before Mr. Justice Story came to the bench; and the judgment rendered at that trial was reversed by the Supreme Court, and the present was a new trial had under the award of a new trial upon the reversal.

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4. An assignment, *with notice*, of a chose in action founded in illegality, will not protect the parties from the legal consequences attached to the original contract.

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5. If a chose in action, *not negotiable*, be assigned, *without notice* of any fraud or illegality in its origin, the parties are not precluded from setting it up as a defence, in the same manner, as if there had been no assignment.

Ibid.

6. In an action between the original parties, an assignment to

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2. Referees are judges as well of the law, as of the fact. Under a general submission, the parties are presumed to agree to refer to them every thing, both as to law and fact, that is necessary for the decision. And, under such a submission, they are not restricted to the dry principles of law, but may award according to equity and good conscience.

Ibid.

3. If referees refer a point of law to the Court, by spreading it on the award, and mistake the law, their award will be set aside. But if, admitting the law, they intentionally decide contrary thereto upon principles of equity, it is no ground to set aside the award.

Ibid.

4. If they make a general award, it cannot be impeached collaterally, or by evidence *aliunde*, for mistake of law or fact; for their judgment is conclusive in both respects, unless there be fraud or misbehaviour. *Ibid.*

5. If the submission be general, and the award be of a particular thing, it will be presumed, that nothing else was in controversy, unless the contrary appear; and, in the latter case, the award will be recommitting. *Ibid.*

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2. If, by the terms of the charter-party, the ship is to be navigated at the charge and expense of the owner, and especially if the whole tonnage of the ship is not let to hire, the charterer is not owner for the voyage. *Ibid.*

3. If the charterer fail to load the ship, he is liable to pay the same freight, in case she returns empty, as would have been earned, if he had complied with his covenant.

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2. If a ship be sold in a foreign port, to evade a forfeiture incurred to the *United States*, no action can be sustained for the proceeds.

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The Brutus. 545

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1. Of the practice on contempts. If the party purge himself on oath, the Court will not hear collateral evidence for the purpose of impeaching his testimony, and proceeding against him for the contempt. But if perjury appear, the party will be recognised to answer, &c.

United States vs. Dodge. 313

See **WITNESS**, 1.

CONTRABAND.

1. In what cases provisions are contraband.

The Commercen. 261

2. Provisions are not treated as contraband, when they are the growth of the neutral exporting country.

S. C. 266

3. Provisions, when destined to a port of naval equipment of the enemy, and *a fortiori*, if destined for the supply of his army, become contraband, and subject the vessel and cargo to confiscation by the other belligerent—more especially, if the country of the captured vessel be at war

with that, to which she is destined.

Maisonnaire vs. Keating. 335

CONTRACT.

See CONSIDERATION, 1, 2.

ASSIGNMENT, 4, 5, 6.

CORPORATION.

1. If a corporation, established in a foreign country, sue in our courts, and war intervene pending the suit, this is not sufficient to defeat the action, unless it appear on the record, that the plaintiffs are not within any of the exceptions, which enable an alien enemy to sue.

Society, &c. vs. Wheeler. 105

2. There is no legal difference, as to the plea of alien enemy, between a corporation and an individual. S. C.

3. In what respects a corporation may be considered to have commorancy. S. C. 131

See JURISDICTION, 3.

DOMICIL, 2.

COSTS.

1. How costs are to be apportioned among the several claimants in prize causes.

The Hiram, &c. 60

2. Practice as to costs and charges, where several parties intervene for separate interests.

The Louisetta. 307

3. In cases of claims on proceeds in the custody of the Court, where other parties are entitled, no attorney's fee, or other costs beyond the actual charges of court, can be allowed.

The Jerusalem. 350

COURTS.

1. The Courts of common law have a concurrent jurisdiction with those of admiralty over maritime contracts.

De Lovio vs. Bait. 398

See PRACTICE, 25.

ADMIRALTY, 1, 5, 6, 7.

JURISDICTION, 1, 3, 4, 5, 6.

PRIZE, 2, 11, 12, 38.

COVENANT.

1. Where the whole consideration for any stipulation fails, or it becomes incapable of being performed substantially as the parties intended; by the voluntary act of one of the parties, the other is not bound to proceed.

Kleine vs. Catara. 61

See CHARTER-PARTY.

CRUISE.

See PRIVATEER.

DECREE.

1. Of the effect of a reversal of a decree of a Court of Probate.

Harvey vs. Richards. 229

DELIVERY ON BAIL.

See PRIZE, 17, 20.

PRACTICE, 21, 22.

DEPOSITION.

See PRACTICE, 19, 20.

DEVIATION.

See SEAMEN, 11.

DISTRIBUTION.

See PRIZE, 2, 3, 4, 5, 7, 42.

DISTRICT JUDGE.

1. In what manner the District Judge should proceed in cases under the act for mitigating penalties, &c. He acts judicially, and is bound by the same rules of evidence, as in other cases.

The Margaretta. 515

See REMISSION, 4, 5, 6.

DISTRICT ATTORNEY.

1. If an attorney of the United States reside within one hundred miles of the place of caption of a deposition, he must be notified.

The Argo. 314

2. In what manner the fees taxed for the district attorney are to be distributed, where part of the services have been performed in the time of one district attorney, and part in the time of his predecessor.

Ex parte, Robbins. 330.
See PRACTICE, 20, 21.

DOMICIL.

1. Domicil in the enemy's country gives a hostile character; and the same principle has been applied to a house of trade established in the enemy's country, though the parties might have a neutral domicil.

The Society, &c. vs. Wheeler. 130

2. The same rule would extend to a corporation established in the enemy's country. *Ibid.* 131

DURESS.

See RANSOM, 2.

DUTIES.

1. No duties are payable on goods imported into the *United States*, unless expressly provided for by statute.

Liverpool Hero. 184

2. The act of 2d August, 1813, ch. 48, releasing one third of the duties on goods captured by private armed vessels, did not apply to vessels brought in before the passing of the act, but not condemned until after it had passed.

Prince vs. United States. 204

3. Duties accrue as soon as the goods are voluntarily imported, and this, as well as to prize goods, as any other; for the condemnation relates back to the time of importation. *Ibid.*

See NAVY, 2.

REVENUE LAWS, 1, 2, 3.

ELECTION.

1. An election to proceed in a state court, where the suit is abandoned, does not operate as

an estoppel to proceed in a court of the *United States* of competent jurisdiction.

Harvey vs. Richards. 231

EMBARGO.

See STATUTES, 1.

EMPIRE.

See FORFEITURE, 1.

HOSTILE OCCUPATION.

ENROLLED AND LICENSED VESSELS.

1. If a vessel licensed for the fisheries be engaged in an illegal traffic, she is forfeited under the 32d sect. of the coasting act. The 6th sect. does not apply to licensed vessels. *The Eliza.* 4

2. The transportation of merchandise for hire is a "trade," which subjects such licensed vessel to forfeiture. *Ibid.*

3. If a vessel licensed for the coasting trade engage in smuggling foreign goods, she is forfeited under the 32d sect. of the coasting act. *The Resolution.* 47

EQUITY.

See BILL IN EQUITY.

ERROR.

1. A mere reversal of a judgment is not a bar to a future suit in law or equity.

Harvey vs. Richards. 216

EVIDENCE.

1. The master of a ship is not a competent witness in an information *in rem* for a forfeiture occasioned by his misconduct.

The Hope. 48

2. A witness cannot be asked a collateral question, not relevant to the matter in issue, barely to test his credibility.

Odiarne vs. Winkley. 51

3. It is a presumption of law, that one who obtains a patent,

has knowledge of any patent, that may have been previously obtained for a similar invention.

S. C. 55

4. In what cases a judgment is conclusive.

Harvey vs. Richards. 229

5. Of the evidence to prove a lost note. *Peabody vs. Denton.* 351

6. Matter, which is stated as inducement to a traverse, is not required to be proved, in an issue upon such traverse.

United States vs. Hayward. 498

7. When the law presumes the affirmative, the proof of the negative is thrown upon the other side.

United States vs. Hayward. 498

8. In what cases the defendant is required to prove the affirmative, although the forms of pleading make it necessary to allege the negative in the indictment or information. *S. C.* 498, &c.

9. In an information on the statutes prohibiting importation, &c. qualified by the subsequent statute excepting neutral vessels from their operation, the burthen of proof of the neutrality rests on the claimant. *S. C.* 499

10. The proof before the District Judge upon a summary hearing in pursuance of the statute providing for remission of forfeitures, &c. must be by competent, as well as credible testimony.

The Margareta. 515

See REVENUE LAWS, 1, 2.

REMISSIONS, 4, 5, 6, 7.

JUDGMENT, 3.

BILLS OF EXCHANGE, &c.

3, 6, 7.

FARTHER PROOF, 4.

PRACTICE, 6, 9, 10.

PRIZE, 41.

FACTOR.

1. A factor is bound to good faith, and reasonable diligence. He cannot pledge his principals' property for his own debts; but for payment of duties accruing on the goods, he may.

Evans vs. Potter. 13

2. Of the duties and powers of factors. *Ibid.*

FARTHER PROOF.

1. Farther proof denied to captors. In what cases allowed or not. *The Bothnea, &c.* 78

2. Farther proof will be allowed to captors, when strong circumstances or obvious equity require it. *Ibid.* 83

3. Under what circumstances farther proof is admissible in cases of an asserted collusive capture.

The George. 249

4. Farther proof in prize causes is never admitted by way of oral testimony; but always by written evidence and depositions. *Ibid.*

5. Where a shipment is made to a firm, and the persons who compose it do not appear, farther proof will be required of the names and domicile of the parties.

S. J. Indiano. 298

6. If the shippers in a hostile ship neglect to put on board documentary evidence of the neutral interest they will not be allowed the benefit of farther proof. *The Flying Fish.* 374

7. An attempted fraud will induce the denial of farther proof to a neutral. *The Betry.* 377

FINES AND PENALTIES.

See COLLECTOR, 3.

FISHERIES.

See ENROLMENT, &c.

FORCIBLE IMPEDING.

See INDICTMENT, 1, 3.

SEIZURE, 2.

FOREIGN CORPORATION.

See CORPORATION, 1, 2.

FOREIGN PORT.

1. A foreign port or place within the meaning of the 1st section of the act of July 6th, 1812, is a port or place within the sove-

reignty of a foreign nation.

The Eliza. 4

2. *Castine*, during its occupation by the British, was not to be considered a port of the *United States*, in reference to the non-importation laws.

United States vs. Hayward. 502

FOREIGN VESSEL.

See REVENUE LAWS, 5.

FORFEITURE.

1. The division of an empire works no forfeiture of rights previously acquired.

Society, &c. vs. Wheeler. 127

See COASTING VESSELS, 1, 2.

MASTERS, &c. 1.

TRADE WITH THE ENEMY, 2.

ENROLMENT, &c. 1, 2, 3.

LICENSE, 1, 2.

REMISSION.

FORMEDON.

See LIMITATION OF ACTIONS,
2, 3, 4.

FREIGHT.

1. No freight is payable, when the voyage is broken up, after its commencement, by an interdiction of commerce with the port of destination, or by accident or superior force. But if the cargo is accepted at an intermediate port, a *pro rata* freight is due.

Saratoga. 179

2. Of the rules respecting freight and wages adopted by foreign writers. *Ibid.*

3. A neutral ship, engaged in transporting provisions for the use of the army of a belligerent, which army is in a neutral country and engaged in a distinct war with a third belligerent, is not entitled to freight.

The Commercen. 261

4. In what cases, the neutral carrier forfeits his right to freight.

Ibid.

See SEAMEN, 6.

GRAND JURY.

1. The grand jury having received testimony of a person not under oath, the indictment was quashed, as irregularly found.

United States vs. Coolidge. 364

HOSTILE OCCUPATION.

1. By the conquest and occupation of *Castine*, that territory passed under the temporary allegiance and sovereignty of the enemy. The sovereignty of the *United States* over the territory was suspended during such occupation, so that the laws of the *United States* could not be rightfully enforced there, or be obligatory upon the inhabitants, who remained and submitted to the conquerors.

United States vs. Hayward. 501

2. *Castine*, during such occupation, was not a port of the *United States* in reference to the non-importation acts. *Ibid.*

3. But a territory, conquered by an enemy, is not to be considered as incorporated into the dominions of that enemy, without a renunciation in a treaty of peace, or a long and permanent possession. Until such incorporation, it is still entitled to the full benefit of the law of postliminy. *Ibid.*

HYPOTHECATION.

See LIEN, SHIPS, &c.

INDICTMENT.

1. What is a sufficient allegation of a forcible impeding, within the act of 2d March, 1799.

United States vs. Bachelder. 11

2. In an indictment for a statute offence, it is sufficient if the offence is substantially set forth, though not in the exact words of the statute. *Ibid.*

3. It is not necessary, in an indictment for resisting a public officer, to set forth the particular exercise of office, in which he was

engaged, or the particular act and circumstances of obstruction.
Ibid.

See SEIZURE, 2.
INSPECTOR, 1, 2.
PASS, 1.
GRAND JURY, 1.

INFORMATION.

See PLEADING, 2.

INSPECTOR.

1. No indictment lies for resisting an inspector, if he had not probable cause of seizure.

United States vs. Gay. 350

2. The office of an inspector of the customs ceases with that of the collector, who appointed him; and an indictment for resisting such inspector after the resignation of the collector, and before his being reappointed to office by the succeeding collector, cannot be sustained.

United States vs. Wood. 361
See OFFICER, 2.

INSURANCE.

See POLICY OF INSURANCE.

INTEREST.

See PRACTICE, 4.

JOINT CAPTURE.

1. In cases of joint capture by privateers, they share in proportion to the number of men composing their respective crews.

The Despatch. 1

JUDGE.

See DISTRICT JUDGE.
REMISSION.

JUDGMENT.

1. Of the effect of a reversal of a judgment or a decree.

Harvey vs. Richards. 229

2. In what cases a judgment in one court may be pleaded in bar to a preceeding in another court.

Ibid.

3. A former judgment is no evi-

dence in an action, except between the same parties or their privies.

Taber vs. Perret. 555

JURISDICTION.

1. The trial of prizes, and of all incidents to the question of prize, and the awarding of damages for an illegal capture made by a lawfully commissioned cruiser, belong exclusively to the courts of the capturing power.

The Invincible. 29

2. The tribunals of one sovereign cannot revise acts done under the authority of another.

Ibid. 44

3. It seems that a corporation established in a foreign country, the members of which are aliens, may sue in the courts of the *United States*.

Society, &c. vs. Wheeler. 106

4. The admiralty Courts of the *U. States* will entertain jurisdiction *in rem*, to enforce a bottomry bond executed in a foreign country, between subjects of a foreign country, when the ship is within the territory of the *United States*.

The Jerusalem. 191

5. In what cases suits will be maintained between foreigners in our courts, and in what cases they will be remitted to their domestic *forum*.

Ibid.

6. The jurisdiction of the Admiralty depends, not on the character of the parties, but on the subject matter, whether maritime or not.

Ibid.

6. A court of common law cannot, even incidentally, decide a question of prize.

Maisonnaire vs. Keating. 235

7. The admiralty has exclusive jurisdiction to entertain suits on ransom bills.

S. C. 341

8. All questions of prize belong primarily to the tribunals of the capturing power.

The Invincible. 29

Maisonnaire vs. Keating. 340

9. Where the subject matter is not within the jurisdiction of the Court, the exception may be taken under the general issue.

S. C. 345

10. The jurisdiction of the District Courts of the United States, as courts of admiralty, extends to all maritime contracts, and to all torts and injuries committed on the high seas, or within the ebb and flow of the tide. A policy of insurance is a maritime contract, and therefore within the admiralty jurisdiction.

De Lovio vs. Boit. 308

11. The courts of common law have a concurrent jurisdiction with the admiralty courts over maritime contracts.

Ibid.

See PRIZE, 11, 12, 38.

ADMIRALTY, 1.

BILL IN EQUITY, 1.

JURY.

1. The Court has power to discharge the jury empanelled to try the issue in a criminal cause, whenever it is necessary for the purposes of justice, and there is no exception of capital cases.

United States vs. Coolidge. 364

2. Special juries were formerly in use in Massachusetts, but are now disused.

Harvey vs. Richards. 556. *Note.*

See PROBABLE CAUSE, 4.

GRAND JURY, 1.

LAWS OF WAR.

1. If an American citizen, after a known war, ship goods from an enemy's port to a port in his colonies, the property, by the law of war, is subject to confiscation.

The Diana. 93

See TRADE WITH THE ENEMY, 2.

LETTERS PATENT.

See PATENT.

LICENSE.

1. Under the second section of

the act, 2d Aug. 1812, ch. 56, a prize allegation could not be sustained for using a British license, unless the vessel was seized *in delicto*, during the voyage.

The Saunders. 210

2. *Quere*, how it would be in an information on the 1st sect. of the same act?

Ibid.

3. The acceptance of and sailing under, a license from an enemy, gives a hostile character to the property, and subjects it to forfeiture.

Maisonnaire vs. Keating. 338

See ENROLMENT, 1.

LIEN.

1. Of the lien of tradesmen and material men for repairs and supplies furnished.

The Jerusalem. 345

See SHIPS, &c. 2, 3, 4, 6, 7, 8.

LIMITATION OF ACTIONS.

1. Of the distinction between a statute of limitation, and a retrospective law.

Society, &c. vs. Wheeler. 141

2. Actions of *formedon* are within the statute of Rhode Island for quieting possessions, and twenty years possession under that statute is a good bar.

Inman vs. Barnes. 315

3. If the statute of limitations has once run against a tenant in tail, it is a complete bar to a subsequent tenant in tail upon a descent cast.

S. C. 315

4. A *formedon in descender* is not within the proviso of the statute of possessions of Rhode Island.

Ibid.

5. The statute of limitations of Massachusetts does not apply to suits in the Admiralty for mariners' wages.

Brown vs. Jones. 477

6. A respondent in the Admiralty, who would take advantage of the statute of limitations, must plead it.

Ibid.

MARINERS.See **SEAMEN.****MARSHAL.**

1. The marshal may have an attachment, to enforce the payment of his fees of office, against suitors in the Court.

Anon. 101

2. So against an endorser on the writ, who by the *lex loci* is liable to respond the costs. *Ibid.*

3. The marshal is entitled to his full commissions, according to the act of 1799, ch. 125, upon all interlocutory sales of prize property. The act of 27, Jan. 1813, applies only to sales after final condemnation. *The Avery.* 308

4. It is the duty of the marshal, upon all interlocutory sales, to bring the proceeds into court, with a regular account of the sales.

Ibid.

5. The marshal is entitled to commissions upon prize property removed from his district, by consent of parties, to another district, and there sold.

The San Jose Indiano. 311**MASTERS OF VESSELS.**

1. Circumstances of presumption of masters' knowledge of illegal goods being on board.

The Hope. 48

2. The master's contracts for supplies and repairs create an hypothecation, by the general maritime law. *Quære*, how far this is controlled as to domestic ships.

The Jerusalem. 345See **EVIDENCE**, 1.**MONEY PAID INTO COURT.**

1. Money deposited in a bank, under a decree and subject to the order of the Court, is "money deposited in Court," within the meaning of the act of 1793, ch. 20, sect.

2.

Ex parte, Prescott. 146**MORTGAGE.**

1. After a foreclosure of a mortgage, the mortgagee may still recover at law, upon the attendant bond or note, the deficiency of the mortgaged property to pay the debt due, calculating the value of such property at the time of the actual foreclosure.

Hatch vs. White. 152

2. An assignment of the debt carries with it, in equity, the mortgaged property.

Ibid. Arg. 155**NATIONAL CHARACTER.**

1. A ship is deemed to belong to the country, where the owners reside. *S. J. Indiano.* 234

2. If a ship carry a neutral flag, but the owners reside in an enemy's country, she is condemnable as prize of war.

S. J. Indiano. 284

3. The national character of a person is decided by that of his domicile. *S. J. Indiano.* 285

4. Under what circumstances the property is deemed hostile, though the person be neutral.

Ibid.

5. The treaty of 1810, between Great Britain and Portugal, did not prevent British merchants, resident in the *Brasils*, from acquiring the neutral character of their domicile.

S. J. Indiano. 292

6. All goods found on board of an enemy's ship are presumed to be the property of the enemy, unless a distinct neutral character is impressed upon and accompanies them.

The Flying Fish. 374*S. P. The Avery.* 387

See **PRIZE**, 1, 28, 29, 30, 31, 32, 33, 34.

NATURALIZATION.

1. An alien enemy cannot be

permitted to make the preparatory declaration.

Ex parte, Newman. 11

NAVY.

1. In what proportions public ships share in cases of joint capture. *The Despatch.* 1

2. Prize goods, brought in by ships of war of the *United States*, are liable to the payment of duties, as to the moiety belonging to the officers and crew of the capturing ship; but no duties are payable on the moiety belonging to the *United States*; the whole of that moiety belongs to the navy pension fund.

Liverpool Hero. 184

NEUTRAL.

1. In what cases the neutral carrier forfeits his right to freight. *The Commercen.* 261

2. A neutral cannot lawfully become the carrier of provisions for the supply of the army of one of the belligerents, although such army be in a neutral country, and directly engaged in hostilities only against a third belligerent. A neutral ship, engaged in such traffic, is not entitled to freight.

Ibid.

3. Where a captured cargo belonged, one half to a neutral, and the other half to an enemy, and there were papers on board, from which the enemy's interest might be discovered, it was held, that the share of the neutral should not be subjected to confiscation, in consequence of his having persisted in a claim for the whole made by his agent, nor of his having sworn falsely, that he was solely interested; such affidavit not having been employed for any fraudulent purpose in the cause, and not having been filed, until after an order for farther proof had passed as to one moiety, and a decree of condemnation had by

consent been entered against the other moiety. *The Betsy.* 377

4. If a neutral fraudulently attempt to cover and claim an enemy's interest in a prize court, he will not be permitted to introduce farther proof, to show his own neutral interest in the same property. *The Betsy.* 377

See NATIONAL CHARACTER, 1, 2, 3, 4, 6.

PRIZE, 27, 34, 38, 43, 47.

RANSOM, 3, 5.

FARTHER PROOF, 6.

STATUTES, 1.

NON-IMPORTATION.

See STATUTES, 1.

HOSTILE OCCUPATION, 2.

NOTICE.

See ASSIGNMENT, 4, 5.

OFFICER.

1. An officer of the customs duly commissioned, and acting in the duties of his office, is presumed to have taken the regular oaths.

United States vs. Bachelder. 11

2. If the collector appoints and commissions an inspector, the approbation of the Secretary of the Treasury is presumed. *Ibid.*

3. Offices held at the pleasure of the collector cease with his death, removal or resignation, unless otherwise provided by law.

United States vs. Wood. 362

See INDICTMENT, 1, 2, 3.

MARSHAL, 1, 2.

SEIZURE, 2.

OTTOMAN EMPIRE.

1. The subjects of the Ottoman empire are not entitled, in matters of contract, to have a different rule applied to them, from that which is applied to subjects of other nations, especially when both the litigating parties are subjects of that power.

Jerusalem. 201

OWNERS OF VESSELS.

1. In what cases the charterer is owner for the voyage.

Kleine vs. Catara. 76

OYER.

1. Oyer is not demandable of the record of another court.

Hatch vs. White. 153

PARTNERS.

1. Where a shipment is made to partners, they are held by the prize court to take in equal moieties, unless upon the original papers a different proportion appears.

S. J. Indiana. 303

2. Where a shipment is made to a firm, and the persons, who compose it, do not appear, farther proof will be required of the names and domicile of the parties.

S. C. 298

See PRIZE, 29, 30, 31, 33.

PROPRIETARY INTEREST, 5.

PASS.

1. *Quærs*, Whether a piece of cloth, or any other agreed signal, is a pass within the meaning of the first section of the act, of 13th of August, 1813, ch. 58.

United States vs. Briggs. 363

PATENT.

1. The original inventor is exclusively entitled to a patent. Mere colourable differences or slight improvements, will not affect his rights.

Osborne vs. Winkley. 51

2. If the inventor of an improvement obtain a patent for the whole machine, such patent is void.

Ibid.

3. What constitutes the identity or diversity of two machines

Ibid.

See EVIDENCE, 3.

POLICY OF INSURANCE.

1. If a policy authorize a stopping at a particular port, it is not necessary for the assured to dis-

close that the ship will call there, although he has information of the fact. *Hubbard vs. Coolidge.* 353

2. The plaintiffs having stated to the underwriters, in answer to some general inquiries, "that they had no knowledge that the ship would call at the Cape, and knew of no motive for calling there, &c." and no farther inquiries being made by the underwriters, this was not a misrepresentation, to avoid the policy. *Ibid.*

3. A representation as to the destination of the ship, if true at the time, and not fraudulently made, does not avoid the policy, although the destination be afterwards changed. *Ibid.*

4. A policy of insurance is a maritime contract, and as such is within the jurisdiction of the District Courts of the *United States*, acting as Courts of Admiralty.

De Lovio vs. Bott. 398

PORT.

See FOREIGN PORT.

PORT OF ENTRY.

See REVENUE LAWS, 4.

POSTLIMINY.

See HOSTILE OCCUPATION, 3.

PRACTICE.

1. If the claimant does not shew a good title to the property, it will not be restored to him, although not condemned as forfeited. But it will be retained in the registry until the real owner appears and proves his title.

The Elisa. 4

2. In such a case, if the property has been engaged in a trade with the enemy, the *United States* may proceed against it as prize of war. *Ibid.*

3. In causes on the Instance side of the Admiralty, the answer of the claimant should be verified by oath; and in a suit for

wages the libellant may compel the adverse party to answer interrogatories.

Gammell vs. Skinner. 45

4. In suits for wages, interest is allowed from the time of demand; and if no demand is proved, from the commencement of the suit.

Ibid.

5. Of the rule for apportionment of costs among the several claimants in prize causes.

The Hiram, &c. 60

6. No commission to take evidence in an enemy's country is allowed by the practice of the prize courts.

The Diana. 93

7. Money deposited in a bank, under a decree of the Court, and subject to its order, is "money deposited in Court;" and the clerk is entitled to commissions thereon.

Ex parte, Prescott. 146

8. An attested copy of a bottomry bond, executed in a distant foreign country, being produced by the libellant, a continuance was allowed, under the circumstances, to enable him to procure the original. *The Jerusalem.* 191

9. A monition to proceed to adjudication is to be heard on the same principles, as a libel by captors, and the burthen of proof is on the claimant. *The Rover.* 240

10. Where, after capture, the vessel had been recaptured by the enemy, and proceeded against as prize, the Court would not suffer a part of the papers from the Court of prize to be read, to shew that there was no original cause of capture, unless the whole papers were produced.

Ibid.

11. There may be an original proceeding for damages against captors without first filing a claim; but usually a claim is first given, and in all cases, the Court will require an affidavit.

Ibid.

12. Regularly there should be no delivery of prize property on bail, until after a hearing of the

cause; and in most cases, a sale is preferable to an appraisement.

The George. 249

13. Of admitting farther proof. It must be written, not oral. *Ibid.*

14. In general, a claimant is not permitted to inspect the papers for the purpose of making his claim; but will afterwards be allowed to use them for correcting any formal errors. And in special cases, upon affidavit, an order will be made for an examination of all papers necessary to the specification of his own claim, but not for a general examination.

The S. J. Indiano. 269

15. A general prize allegation cannot be properly joined with an information on a seizure for the violation of a statute.

The Dimon. 306

16. Practice as to costs and charges, where several parties intervene for separate interests.

The Louisetta. 307

17. Where a party claims under an attachment, he must file a caution in Court, to hold the proceeds remaining after satisfying prior claims.

S. C. 307

18. Practice as to payment of prize shares to special agents.

The S. J. Indiano. 311

19. When there is an attorney of record, it is improper to take depositions without notice to him or to the party. *The Argo.* 314

20. When depositions are taken to be used against the *United States*, if there be an attorney of the *United States* within one hundred miles of the place of caption, he must be notified.

S. C. 314

21. No delivery of property on bail can legally be made in cases, where the *United States* are a party, without due notice to the District Attorney, that he may have a hearing before the Court.

Ex parte, Robbins. 322

22. *Quere*, if a delivery on bail can be ordered by the Court in

vacation before the return term of the process. S. C. 322

23. Practice as to taxation of costs, in case of a claim on proceeds, where other parties are interested. *The Jerusalem*. 345.

24. Of the power of the Court to discharge the Jury.

United States vs. Coolidge. 366

25. In every case of a motion to the Court for a *cassatur*, the facts, on which it is grounded, must be proved by affidavit.

S. C. 367

25. The captors have a right to use papers, which have been once filed by the claimant, subject to any explanation, the other party may offer. *The Betsy*. 381

25. The Circuit Court cannot rehear a cause, or admit a claim, at a term subsequent to that, in which the cause was finally decided. *The Avery*. 386

26. Where important evidence may be gathered from an inspection of the original papers in a prize cause, they may, in case of appeals, be delivered to the captors, upon their undertaking to deliver them to the Supreme Court. *The Francis*. 397

27. Of the practice upon the statute for mitigation, &c. of penalties. *The Margarets*. 515

See INDICTMENT, 1, 2, 3.

PRIZE, 3, 4, 16, 17, 18, 19, 20, 21, 25, 39, 41, 42, 47.

ADMIRALTY, 1.

MARSHAL, 1, 2, 3, 4, 5.

OYER, 1.

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PRINCIPAL AND AGENT.

1. Though an agent may claim, in a prize court, yet if a sufficient time intervene, the principal must support it by his affidavit.

The Betsy. 383

2. An agent, who is party to an

illegal transaction, and has in his hands the proceeds, may set up such illegality against the action of any party concerned with him.

Fales vs. Mayberry. 563

3. If an agent to collect and receive payment of bills, transmits them to his own private agent, to receive the money, and place the amount, when received, to his private credit, payment to such agent is payment to the original agent; and if there be a failure, it is the loss of the latter, and not of his principal.

Taber vs. Perrot. 565

4. *A fortiori*, this applies, where the money has been drawn for by a bill in favour of a third person, which has been accepted before the failure. *Ibid*.

PRIVATEER.

1. Where the crew of a privateer engaged to remain on board three months from the time of sailing, unless the cruise should be sooner completed in the opinion of the owners; and the three months having expired, while the privateer lay refitting in a port of France, thereupon new articles were signed for a second cruise; it was held, that the first cruise continued until the return of the vessel to the *United States*—and that assignees of shares in the original cruise, and the officers and crews, who were put on board of prizes on the outward voyage, and did not rejoin the privateer, were entitled to share in prizes made on the homeward voyage.

The Brutus. 526

2. A cruise, *ex vi termini*, imports a definite place, as well as time, of beginning and ending, unless there be something in the articles expressly to control that construction. When not otherwise specially agreed, a cruise begins and ends in the country, to which the ship belongs. *Ibid*.

Quare, whether it comprehends a return to the home port of the vessel. S. C. 540

3. A cruise for three months means, that three months only shall be employed in cruising, and not that the engagement for the cruise is then, to all intents and purposes, to terminate.

S. C. 545

4. A cruise, like a voyage, begins in legal contemplation, when the ship breaks ground for the purpose of sailing. *S. C. 541*

5. When the term of time once begins to run, it is not suspended by any intermediate accident or casualty happening in the course of the cruise. *S. C. 542*

6. The commander of a privateer has no implied authority to break up the cruise, and to institute a new cruise. *S. C. 548*

See PRIZE, 2—10.

JOINT CAPTURE, 1.

DUTIES, 1.

PRIZE.

1. The *United States* may proceed against property found engaged in trade with the enemy, as prize of war. *The Eliza. 4*

2. The admiralty, as a court of prize, will take cognizance of every incident to the question of prize, and will therefore entertain a supplemental suit for distribution of prize proceeds.

The St. Lawrence. 20

3. If the prize proceeds remain in the Circuit Court, application for distribution may be originally made there. If they have been paid over, and the cause is no longer pending, the District Court is the proper jurisdiction. *Ibid.*

4. Notwithstanding the act of 27th January, 1813, ch. 155, the marshal, in making distribution, acts under the control of the prize court. *Ibid.*

5. The act of 27th January, 1813, ch. 155, applies only to sales made after final condemnation.

Ibid.

6. Of the appointment, duties and authority of prize agents. *Ibid.*

7. Prize agents have an authority coupled with an interest, and

a lien on the proceeds for their disbursements and commissions. Their authority will not be disturbed until all these are satisfied, but, this being done, the officers and crew have a right to receive their shares, by themselves or their particular agents, directly from the Court. *Ibid.*

8. Prize agents *de facto*, though irregularly appointed, have a lien for their disbursements and commissions. *Ibid.*

9. In the absence of all other regular prize agents the owners of the ship and their agents are entitled to the trust and management of the property. *Ibid.*

10. A commander of a privateer, who is authorized to award certain reserved shares among the most deserving, cannot award a share to himself. *Ibid.*

11. The trial of prizes belongs exclusively to the courts of the country of the captors. Neutral nations may interfere so far only as to ascertain, whether prizes brought into their ports have been captured by a lawfully commissioned vessel, and whether the neutral sovereignty has been violated in the capture. And it makes no difference, whether the captured property belong to an enemy or to the neutral.

The Invincible. 29

S. P. Maisonnaire vs. Keating.

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12. No suit can be sustained in a neutral tribunal against a lawfully commissioned cruiser, which is brought within its jurisdiction, to recover damages for a supposed illegal capture. *The Invincible. 29*

13. What constitutes probable cause of capture may depend on the ordinances of the country of the captors. *Ibid.*

14. Case of collusive capture. Farther proof denied to the captors, and condemnation to the *United States*, subject to the rights of the seizing officer. In what cases farther proof allowed or not.

The Bothnea, &c. 78

15. It is the duty of the captors to bring in the prize crew, or at least the master and principal officers, with the prize, for adjudication. *Ibid.*

S. P. The Arabella, &c. 368

The Flying Fish. 374

16. The custody of the papers of captured vessels belongs exclusively to the prize court; and it is the duty of captors, on arrival, immediately to deliver them into the registry, on oath.

The Diana. 93

17. Prize goods are never delivered on bail until after a hearing, and a contrary practice is a great irregularity. Nor is the claimant, even after a hearing, entitled to a delivery on bail, without shewing a *prima facie* legal title. If he claim by an illegal act, he is not entitled to a delivery on bail. *Ibid.*

18. When the property is destined for sale in the country, where the Court sits, an order of sale is the more correct course. *Ibid.*

19. During war, no claim in opposition to the ship's papers and preparatory evidence is ever admitted in a prize court. *Ibid.*

20. No commission to take evidence in an enemy's country is allowable by the practice of the prize courts. *Ibid.*

21. It seems, that the appellate court may direct the claimant to account on oath for property, which has been delivered on bail by the District Court in a gross case of illegality. *Ibid.*

22. All prizes, made by public armed ships of a nation, belong to the sovereign.

Liverpool Hero. 188

23. As it respects duties, condemnation of prize goods relates back to the time of importation.

Prince vs. United States. 209

24. To make a vessel good prize for using a British license, she must have been seized *in delicto*. So of breaches of blockade, &c.

The Saunders. 215

25. On a motion to proceed to adjudication, the cause is to be heard in the same manner, and upon the same principles, as upon a libel by the captors, and consequently the *onus probandi* is on the claimant. *The Rover.* 240

26. Courts of prize look to the legal interest in the ship, and do not recognize neutral *equitable* interests. *S. J. Indiano.* 284

27. The residence of the owners, and not the flag, determines the national character of a ship. *Ibid.*

28. The property of a person may acquire a hostile character, although his residence be neutral. Therefore, where a person is engaged in the ordinary or extraordinary commerce of an enemy's country, upon the same footing, and with the same advantages, as native resident subjects, his property employed in such trade is deemed incorporated into the general commerce of that country, and subject to confiscation, be his residence where it may.

S. J. Indiano. 236

29. If there be a house of trade established in the enemy's country, the property of all the partners in the house is condemnable as prize, notwithstanding some of them have a neutral residence. But such connexion will not affect the other separate property of the partners having a neutral residence. *S. J. Indiano.* 289, &c.

30. If such house ship goods, on *their own account*, to one of the partners, who is domiciled in a neutral country, it is liable as prize. But it is otherwise, if the shipment be made by the order of the partner, *on his separate account and risk.*

S. J. Indiano. 289

31. If a person domiciled in the enemy's country be a partner in a house of trade established in a neutral country, and ship goods to them upon their *joint* account and risk, the goods are not liable to condemnation. But it is other-

wise if shipped for his separate account. *S. J. Indiano.* 291

32. In general, the residence of a stationed agent in an enemy's country will not affect the trade of the neutral principal with a hostile character. But this is true only as to the ordinary trade of a neutral, as such, carried on in the ordinary manner; for if such trade is carried on, not on the footing of a foreign merchant, but as a privileged trader, or by an incorporation with the general commerce of the enemy, in the same manner, and with the same benefits, as a native merchant, it is deemed hostile.

S. J. Indiano. 291

33. Therefore, if a partner in a neutral house be domiciled in the enemy's country, and engaged in its general commerce, for the benefit of his neutral house, the property is condemnable as prize.

S. J. Indiano. 291

34. Where a shipment is made in an enemy's vessel, in a voyage from an enemy's country, it is presumed to belong to enemies, unless a distinct neutral character be impressed upon it.

S. J. Indiano. 302

35. A court of common law cannot, even incidentally, decide a question of prize.

Maisonnaire vs. Keating. 325

36. Of the probable cause, which justifies capture by a friendly belligerent. *S. C.* 336

37. A British license on board of a ship of a country at war with Great Britain, and laden with a cargo of provisions, afforded such a presumption of concealed British interests, as justified a capture by another belligerent.

S. C. 336

38. The prize courts of a belligerent may take jurisdiction of property captured by its cruisers, while such property is lying in a foreign neutral port.

The Arabella, &c. 368

39. It is the duty of the cap-

tors to bring in the master of the captured ship, and the ship's papers. An omission to do this must be satisfactorily explained to the Court, or it will withhold condemnation. *Ibid.*

S. P. The Flying Fish. 374

40. The removal of prize goods is an irregularity, but is indulged under certain circumstances.

The Arabella, &c. 368

41. How far the want of regular evidence may be supplied by the affidavits, or written declarations, of the captured. *Ibid.*

42. Of the mode of sale and distribution, in case of condemnation of prize goods, lying in a foreign neutral port. *Ibid.*

43. All goods found on board of an enemy's ship are presumed to be the property of the enemy, unless accompanied by documents which clearly evince their neutral character, and farther proof will not be allowed.

The Flying Fish. 374

44. The omission to bring in the master, or some other principal officer of the captured ship, will sometimes induce condemnation to the United States. *Ibid.*

45. Indulgence to captors, who had released the master from compassion. *Ibid.*

46. A court of prize will never aid a party, who has sought to impose on it. *The Betsy.* 386

47. If, upon the ship's papers, it be doubtful, whether the property captured as prize belong to an enemy, it is not usual to proceed immediately to condemnation, although no claim be interposed. But if, in such case, no claim be interposed within a year and day, condemnation is of course to the captors. *The Avery.* 386

See Costs, 1.

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14, 15, 16, 25.****NEUTRAL, 1, 2, 2, 4.****PROBABLE CAUSE.**

1. Probable cause of capture may depend on the ordinances of the country of the captors, as well as on the laws of nations.

The Invincible. 29

2. Probable cause exonerates the captors. What constitutes such probable cause.

The Rover. 240

3. Of the probable cause, which justifies capture by a friendly belligerent.

Maisonnaire vs. Keating. 336

4. What constitutes probable cause is, when the facts are given, a question of law.

United States vs. Gay. 359

See SEIZURE, 2.

PROBATE COURT.

1. Of the nature and effect of a decree in a Court of Probate, and the parties whom it binds.

Harvey vs. Richards. 216

2. A simple reversal, by the Supreme Court, of a decree of the Probate Court ordering distribution is no bar to a subsequent bill in equity to compel distribution.

Ibid.

3. Such reversal is not conclusive in another court, as to the reasons of appeal—especially if there be several and it do not proceed distinctly upon any one.

*Ibid.***PROOF.**

1. On whom the burthen of proof lies in cases within the exceptions of a statute provision.

United States vs. Hayward. 497

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PROPERTY.

See PRACTICE, 1.

PROPRIETARY INTEREST.

1. The doctrine as to *stoppage in transitu* applies only to the case of insolvency, and presupposes, not only that the property of the goods has passed to the consignee, but that the possession is in a third person in transit to the consignee. It cannot apply to a case, where the actual or constructive possession remains in the shipper, or his exclusive agents. *S. J. Indiano.* 294

2. In general, the rules of the prize court as to the vesting of property, are the same as those at common law. *S. C.* 295

3. Where a merchant abroad, in pursuance of orders to purchase goods, sells his own goods, or purchases goods for his correspondent, *on his own credit*, no property vests in the correspondent, until he has done some notorious act, to divest himself of his title, or has parted with the possession by an actual and unconditional delivery for the use of such correspondent. *S. C.* 296

4. A shipment to the shipper's own agent, of goods so purchased, giving him a right to hold them, until he has made arrangements with his correspondent, does not divest the title or possession of the shipper. *S. C.* 296

5. Where a shipment is made to partners, they are held to take in equal moieties, unless upon the original papers a different proportion appears. *S. C.* 303

6. If a shipment be made without, or contrary to orders, it still remains at the risk of the shippers. *The Francis.* 391

7. If a shipper have general discretionary orders to ship goods, the shipment will remain at his own risk, unless at the time of shipment, by some unequivocal act, he appropriates the

shipment to his correspondent. Until such appropriation, the property is not changed. *Ibid.*

PROVISIONS.

1. In what cases provisions are contraband. *The Commercen.* 264

2. When provisions are the growth of the neutral exporting country, they are not treated as contraband. *S. C.* 265

RANSOM.

1. *It seems*, that the ransoming of captured property must not be made at any distance of time or by any new voyage undertaken for this purpose.

The Wellington. 104

2. Duress, arising from threats of destruction of vessel and cargo, cannot be admitted to avoid a contract of ransom, where the capture was justified by probable cause.

Maisonnaire vs. Keating. 337

3. It is competent for a friendly belligerent to ransom the property of a neutral after capture.

S. C. 337

4. A ransom is rather a relinquishment of all the interest of the captors, than a repurchase from them of an actual vested right.

S. C. 338

5. There seems to be no legal difference between a ransom of the property of an enemy, or of a neutral; and indeed the ransom of a neutral stands upon stronger ground than that between enemies.

S. C. 338

6. The admiralty has exclusive cognizance of suits on ransom bills—but an action may be sustained at common law on a bill of exchange given as collateral security for the payment of the ransom bill.

S. C. 341

REAL ACTIONS.

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1. Commissions to take evidence may be had in vacation. 390

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See PRIZE, 23.

REMISSION.

1. The Secretary of the Treasury has no power to remit penalties, unless in cases provided for by law. *The Margareta.* 519

2. If the Secretary recites his authority under a special act, and assumes to remit in pursuance of that act, the remission, if unsupported by such act, cannot be supported under the general act, of 3d March, 1797, ch. 67. *Ibid.*

3. Under the act of 27th Feb. 1813, ch. 175, the Secretary of the Treasury had no authority to remit penalties for goods subsequently imported, contrary to the non-importation acts.

S. C. 523

4. Under the act of 3d March, 1797, ch. 67, the District Judge must state the facts, and not merely the evidence of the facts; and the Secretary must proceed upon the statement only. *S. C.* 521

5. In making such statement the Judge acts judicially, and is bound by the same rules of evidence as in other cases. *Ibid.*

6. A statement by the District Judge, that the claimant only swore to the facts before him, is not legal proof under the act of 1797, upon which the Secretary is authorized to remit. *Ibid.*

7. It is not competent for any other tribunal collaterally to question the competency of the evidence, or the regularity of the proceedings, which preceded such statement of the Judge. *Ibid.*

8. Where such a statement is transmitted, the opinion of the Secretary as to their sufficiency to bring the case within the statute, is conclusive. *S. C. 522*

9. Under the act of 27th Feb. 1813, ch. 175, the Secretary had no authority to remit a part only of the property forfeited. He was bound to remit the whole penalty or forfeiture, if any.

10. Neither under the act of 1797, nor that of 1813, had the Secretary any authority to remit the collector's share of the forfeiture *eo nomine*. *Ibid.*

11. Until final judgment, no part of the forfeiture vests absolutely in the collector; but after final judgment, his share vests absolutely, and cannot be remitted. *Ibid.*

12. *Quære*, whether fines for offences, as well as penalties and forfeitures, can be remitted by the Secretary of the Treasury under the act of 1797, ch. 67.

Ex parte, Marquand. 555

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RETROSPECTIVE LAWS.

1. What laws may be said to be retrospective.

Society, &c. vs. Wheeler. 139

2. *Quære*, are they against natural justice? *Ibid.*

3. The distinction between retrospective laws, and statutes of limitation. *Ibid. 141*

See CONSTRUCTION, 1.

REVENUE LAWS.

1. No person can set up the defence of unavoidable accident, &c. under the 27th section of the act of 2d March, 1799, ch. 128, unless he has complied with the directions of that act respecting proof before the collector, or have

been prevented from such compliance by inevitable accident.

United States vs. Hayward. 505

2. That the Collector has admitted such goods to entry is not legal evidence, that the statute proof has been exhibited, nor that such accident, &c. exists. The belief of the Collector is not legal evidence of the existence of such accident, &c. *Ibid.*

3. It is a good defence under the 50th sect. and 92d. sect. of the act of 2d March 1799, ch. 128, that the party has been prevented by inevitable accident, &c. from complying with the requisitions thereof. But such defence is not allowable under a plea, which simply puts in issue the facts constituting a forfeiture withing those sections.

S. C. 509

4. If the proper port of entry for the District be in possession of the enemy, the Collector may remove the customhouse to some other convenient port within his District, and there admit vessels to entry. *S. C. 510*

5. If an unlivery of a foreign vessel at the proper port become impossible from that port being in possession of the enemy, and such unlivery be indispensable for the preservation of the property, it may be lawfully made at a port, where ordinarily foreign vessels are not permitted to unlade. *S. C. 512*

6. What constitutes a case of unavoidable accident, necessity or distress. An imminent and immediate danger of capture constitutes such a case; but not if the danger be remote, or not instant and pressing.

S. C. 513

7. To authorize an unlading, as in a case of accident, &c. the danger of capture must act di-

rectly on the goods or vessel, and the circumstances must be such as render an immediate unloading indispensable. *Ibid.*

See *DUTIES*, 1, 2, 3.

SEAMEN.

1. If a mariner, shipped for a cruise, be disabled and leave the privateer, by common consent, before the cruise has commenced, he is not entitled to a share of prizes. *Ex parte, Giddings*. 56

2. *Aliter*, if he were disabled, during the cruise; and, in such case, on board of a merchant ship, he would be entitled to his full wages during the voyage. *Ibid.*

3. The contract for mariners' wages is not dissolved by a capture, unless followed by condemnation. During the prize proceedings it is suspended, and by restitution or recapture, the parties are remitted to their former rights. *The Saratoga*. 164, 176

4. Seamen, after a capture, have a right to remain by the ship.—*Quere*, at what time, they may lawfully quit the ship? *Ibid.*

5. If, pending the voyage, there be an interdiction of commerce with the port of destination, by war or otherwise, and in consequence the voyage is broken up, no wages are due. But if the mariners be subsequently retained by the master to refit and repair the ship, they are entitled to a reasonable compensation in the nature of wages. And if afterwards discharged in a foreign port, the mariners are entitled to two months pay, provided by the act (28th Feb. 1803) and may recover it, if unpaid, by a suit in the Admiralty. *Ibid.*

6. Of the exceptions to the rule, that, to entitle to wages, freight must be earned.

The Saratoga. 164

7. A mariner shipped on a voyage "to the *Pacific, Indian and Chinese Oceans, or elsewhere*, on a trading voyage; and from thence back to *Boston*," with a stipulation that two months wages should be paid on arrival at *Canton*; the voyage being in fact a trading voyage to the *Northwest Coast* for furs;

It was held, that the outward voyage terminated at *Canton*, and that the shipping articles did not authorize a return from *Canton* to the *Northwest Coast*, and that, therefore, it was not a desertion in a mariner to leave the ship at *Canton*, it being the intention of the master to return to the *Coast*. *Brown vs. Jones*. 477

8. It seems, that a "trading voyage" does not include a "freighting voyage." *Ibid.*

9. The words "or elsewhere" in the shipping articles, are either void for uncertainty, under the act of Congress regulating mariners in the merchants' service, or are to be construed as subordinate to the principal voyage stated in the articles. *Ibid.*

10. The statute of limitations of *Massachusetts* applies only to suits at common law for mariners' wages, and not to suits in the Admiralty. *Ibid.*

11. Though a "trading" and not a "freighting" voyage, is described in the articles; yet the taking on board of goods on "freight" is not a deviation, to discharge the seamen, if it occasion no unnecessary or unusual delay—but the seamen, in such case, are not bound to remain by the ship for the purpose of unloading the freight cargo. *Ibid.* 482

See *PRACTICE*, 3, 4.

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SEIZURE.

1. At common law, any indivi-

dual might seize for the King, and upon this ground it has been held, that public or private armed ships may seize for violation of a statute. But, in such case, it is at the peril of the party making the seizure. *The Rover*. 241

2. To justify a seizure, there must be probable cause of seizure; and if an officer of the customs seize without probable cause, no indictment lies for resisting him in the seizure; for he is not in the execution of his office.

United States vs. Gay. 350

SHIP AND SHIP OWNER.

1. The legal title to the ship only is regarded in a prize court.

San J. Indiano. 284

2. By the general maritime law, every contract of the master for repairs and supplies imports an hypothecation.

The Jerusalem. 349

3. A tradesman has a lien on a foreign ship, lying in a port of the *United States*, for repairs made by him on board, and such lien will be preferred, in point of right, to a bottomry interest which is prior in point of time, if it appear that the repairs were indispensable. *S. C.* 345

4. *Quare*, if there be a lien for repairs and supplies in the case of a domestic ship. *S. C.* 349

5. In what cases the charterer is owner for the voyage.

Kleine vs. Catara. 76

6. A wharfinger has a lien on a foreign ship for wharfage by the law of the Admiralty.

Ex parte, Lewis. 483

7. But if the wharfinger have made an express personal contract with the ship owner, the Court will not give the wharfinger a priority of claim over a bottomry interest, which previously attached on the ship. *Ibid.*

8. *Quare*, if such personal contract be a waiver of the lien? *Ibid.*

See COASTING VESSELS, 1.
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1. The repealing clauses in the act of 1814, ch. 116, did not operate strictly as repeals of the act of 1st of March, 1809, ch. 91, so far as revived by the act of 2 March, 1811, ch. 96, but as exceptions to the general provisions of those acts in favour of British goods imported in neutral vessels.

United States vs. Hayward. 493

2. Exceptions which come in by way of proviso, or in subsequent statutes, are properly matter of defence for the defendant, and it is not necessary for the plaintiff to negative them. *S. C.* 497

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The Brutus. 539

See **SEAMEN**, 11.

CRUISE.

WAGES.

See **SEAMEN**, 1, 2, 3, 5, 6, 10.

PRACTICE, 3, 4.

1. One, who was not a Quaker, refusing to be sworn as a witness, on the ground of conscientious scruples arising from a declaration formerly made, was committed for a contempt, the liberty to affirm being strictly confined to Quakers by the laws and practice of *Massachusetts*.

United States vs. Coolidge. 384
See **EVIDENCE**, 1, 2.

YEAR AND DAY.

1. If no claim is interposed to captured property within a year and day, it is condemned to the captors. This is by the immemorial usage of the Admiralty, and is found in many analogous cases at common law.

The Avery. 388.

ERRATA.

Page. Line.

118 13 from the top, for *devest* read *divest*.

152 13 from the bottom, for *part* read *per cent*.

216 13 from the bottom, for *it* read *is*.

238 9 from the bottom, for *accepter* read *acceptor*.

282 14 and 16 from the bottom, for *vender* read *vendor*.

289 16 from the bottom, for *prevents* read *presents*.

294 last line of the page, for *in* read *on*.

304 The paragraph should begin at *In his answers, &c.* line 13 from the bottom.

367 4 from the top, for *could* read *would*.

402 note 16, for *marchan te tmarchant* read *marchant et marchant*.

458 12 from the top, for (.) read (;) after *court*.

IN THE FIRST VOLUME,

Page 391, line 2 from the bottom, for *intrinsic* read *extrinsic*.









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